Supreme Court, U.S.
FILED
SEP 27 2004
OFFICE OF THE CLERK

No. 04 435

In The

Supreme Court of the United States

ANTHONY F. MURRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit and the District Court erred in applying an unconstitutionally vague and overbroad definition in upholding petitioner's conviction under Title 18, United States Code Section 2422(b), for attempting to induce a minor to have sex via use of the internet where petitioner never directly communicated online with a purported minor, nor anyone posing as a minor, nor did petitioner believe he was in direct internet online communication with a minor, and where petitioner instead was in communication with a deputy sheriff posing as the father of a minor; and in wrongfully affirming the lower court's decision did the Court choose the broader and harsher of two alternative definitions of "induce," and hold that "induce" simply means "cause" for purposes of § 2422(b), which contravenes *United States v. Panfil,* renders § 2422(b) unconstitutionally vague and overbroad; unfairly ignores specific Congressional intent to protect children from online harmful communications; and violates both the "clear statement rule" and the rule of lenity.

2. Whether the District Court and Eleventh Circuit erred in determining that there can be two two-level sentencing enhancements where there is a fictitious victim, and there is only indirect contact via an intermediary fictitious parent, thus improperly applying United States Sentencing Guidelines enhancements, specifically sections 2G1.1(b)(2)(B) and 2G1.1(b)(5).

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RULES:

Rule 11(A)(2), Federal Rules of Criminal Procedure 1

OPINION BELOW

The Eleventh Circuit Court of Appeals decision is reprinted in the Appendix at 1-14. The District Court's ruling as part of a hearing on the dispositive motion to dismiss, and conditional plea pursuant to Rule 11(A)(2) of the Federal Rules of Criminal Procedure is reprinted in the Appendix at 15-45.

JURISDICTION

The Eleventh Circuit filed its decision on May 4, 2004, and entered an order denying petitioner's motion for rehearing on June 29, 2004, which is reprinted in the Appendix at 46-47. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2422(b)

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

U.S.S.G. 2G1.1(b)(2)(B)

Specific Offense Characteristics: (2) If the offense involved a victim who had (B) attained the age of 12 years but not attained the age of 16 years, increase by 2 levels.

U.S.S.G. 2G1.1(b)(5)

If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by 2 levels.

STATEMENT OF FACTS

The facts are taken from the opinion of the Circuit Court, which were in turn taken from the stipulated facts on the record in the District Court. They are as follows:

During September 2002, Petitioner Anthony Murrell, under the screen name "Bone 1031," entered two separate America Online ("AOL") chat rooms in which he communicated with undercover Detective Neil Spector of the St. Lucie County, Florida, Sheriff's Office.

On September 16, in the "family love" chat room, petitioner engaged in an online chat with Spector, who was posing as the adult mother of a thirteen year-old daughter. During their exchange, petitioner expressed an interest in meeting the mother and daughter for a "discreet sexual relationship." In a subsequent email, he stated, "I would like to be able to get intimate with you and [your daughter] if the spark is there," and provided his phone number.

On September 18, while Detective Spector was in a chat room entitled "Rent F Vry Yng," in an undercover capacity as an adult male with a fictitious teen daughter, he received another message from petitioner. Petitioner wrote: "Hi. Are you renting daughter?" Spector responded that his daughter was thirteen years old. Petitioner then wrote that he lived near Orlando and asked if "the daughter enjoyed being rented." He also inquired whether the daughter had had sex yet, and questioned whether she would "go along." Spector asked petitioner whether he was serious and what he had to offer. Petitioner suggested that the two speak on the phone, and gave Spector his phone number. Spector also gave petitioner his undercover phone number.

Spector called petitioner and asked him whether he was sincere in his interests and whether he was a "cop." Petitioner replied that he was sincere, but that he wanted the same assurances from Spector. During the conversation, petitioner explained his intentions. He expressed that he wanted to have oral sex and intercourse with the daughter, and stated, "what I actually recommend is maybe once or twice, just me and her."

Over the next few days, petitioner and Detective Spector communicated online and by telephone, culminating in an agreement that petitioner would meet Spector and his purported daughter at 5:00 p.m. on September 24 at the Vero Beach Holiday Inn, and that petitioner would pay Spector $300.00 for sex with the minor.

At approximately 5:05 p.m. on September 24, petitioner arrived at the Vero Beach Holiday Inn and met with Detective Spector who was acting in his undercover capacity. Petitioner showed Spector a teddy bear he had

brought for the daughter. He was also carrying $300.00 and a box of condoms. Petitioner indicated that he was ready to meet the girl, and was arrested as he walked toward a hotel room in which he believed the minor was waiting. **[NOTE: The stipulated facts in the trial court included the fact that petitioner called Spector by cellular phone shortly before arriving at the motel, and petitioner suggested the meeting place be moved to a fast food restaurant.]**

On October 3, 2002, a federal grand jury in Ft. Pierce, Florida returned an indictment charging petitioner under 18 U.S.C. § 2422(b). Petitioner initially pled not guilty. On February 6, 2003, he filed a motion to dismiss the indictment, in which he stipulated to certain facts, but claimed that his actions were not criminal under § 2422. After holding a hearing on the matter, the District Court denied his motion. Petitioner entered a conditional guilty plea on February 19, 2003, without the benefit of a written plea agreement. As a condition of his plea, he preserved his claim that his stipulated conduct did not violate § 2422.

On April 23, 2003, the District Court held a sentencing hearing, in which it overruled petitioner's objections to the two two-level sentencing enhancements under U.S.S.G. 2G1.1(b)(2)(B) and (b)(5) recommended in his PSI. Petitioner was sentenced to a 33-month term of imprisonment, to be followed by a three-year period of supervised release. The court also ordered him to participate in sex offender and mental health treatment programs, and imposed restrictions on his use of computers.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD EXAMINE THE FACTS AND LAW AND DETERMINE THAT PETITIONER'S ACTS DID NOT VIOLATE THE STATUTORY PROVISION UNDER WHICH HE WAS CHARGED, CONVICTED, AND SENTENCED BECAUSE THE DEFINITION USED TO UPHOLD THE CONVICTION IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.

The Eleventh Circuit, faced with a case of nationwide first impression under a to-date factually unique federal prosecution for an alleged violation of Title 18, United States Code § 2422(b), utilized an alternative definition of the word "induce" to uphold the conviction of petitioner as the result of a sting where the undisputed facts show that petitioner used the internet to communicate with the purported father of a child – never with the child nor anyone portraying a child. Petitioner's arrest was the result of an undercover sting where the role of a father was played by a deputy. In the relevant preceding cases in the various circuit courts, there was an actual child, or an agent playing the role of a child in direct communication at some point with those respective defendants. Petitioner maintains that this factual distinction takes his conduct outside the scope of § 2422(b), and that the lower court ignored the plain meaning of the statute, and its limited scope of prohibited conduct.

Children are entitled to the greatest protections our system of law can provide. Nevertheless, the proper outcome of this case should spotlight the current law's deficiencies by reversing the conviction rather than permitting a wrongful application of the challenged statute.

The Eleventh Circuit ruled that the element of attempted inducement of a child is met without a child or anyone play-acting a child because the American Heritage Dictionary's alternative-choice definition of induce is "to stimulate the occurrence of; cause." Petitioner argues the statute does not cover his particular conduct. By contrast Black's Law Dictionary is devoid of such an alternate definition. As a practical matter the sting by the undercover officer was set up not to portray the child as unwilling and needing to be plied, but to the contrary, the sting was set up as a father more than willing to prostitute his own daughter with no stimulating or "inducing" necessary by the petitioner. The petitioner would argue this distinction takes his conduct outside the scope of current 2422(b).

He also sought to change the meeting place from a motel to a fast food restaurant minutes before the meeting based on the stipulated facts in the District Court, and all of this communication took place either online, or by telephone with the purported father.

Petitioner did not violate 2422(b), because Congress did not address petitioner's type of conduct in passing its amendment to the Communications Decency Act of 1996 as part of the Telecommunications Act of 1996 resulting in the 1998 change to the statute. The use of words "or attempts to do so" is insufficient to cover petitioner's conduct where the inclusive language would have been, "or any other person," for example.

The plain meaning of the statute, *United States v. Perrin,* 100 S. Ct. 311 (1979), as well as the legislative history of the statute offers no support for the reasoning of the Circuit Court, which contradicted its own decision in *United States v. Panfil,* 338 F.3d 1229 (11th Cir. 2003).

Instead, the plain meaning seems to solely protect children while using the internet by prohibiting predators from directly communicating or attempting to communicate online with them unlawfully.

The cases decided before this case have the common thread of communication with a child or purported child directly. There is State of Florida legislation to prosecute attempted solicitation without permitting the government to shoe-horn petitioner's conduct to fit a misapplied federal statute.

Since passage of the amendment criminalizing attempts in § 2422(b) to Title 18, there have been cases applying the statute in at least three separate circuits, each case rejecting challenges to the core issue of what constitutes an attempt under the new language. Those cases are *United States v. Farner*, 251 F.3d 510 (5th Cir. 2001), *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), *United States v. Panfil*, 338 F.3d 1229 (11th Cir. 2003) and *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 1006 (Mem.) (2003). The common thread in those cases is direct contact.

In the decision below, the court acknowledged that petitioner did ***not*** use a facility of interstate commerce in an attempt to "persuade" ***or*** "coerce" ***or*** "entice" a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). *United States v. Murrell*, 368 F.3d 1283, 2004 WL 944004 at *4 (11th Cir. May 4, 2004). Implicitly, the court found, the terms "persuade," "coerce" and "entice" by their very nature require direct communication with a minor over the internet. *See id.* And in fact, the court acknowledged that ***one*** of the ***two alternative definitions*** of the final term used in § 2422(b) – "induce" –

similarly requires such direct communication. *Id.* Nonetheless, it held, because "induce" could ***alternatively*** be defined as "cause," and using the internet to "cause" a minor to engage in sexual activity does ***not*** require a direct online communication with the minor, this was the proper interpretation of "induce" as used in § 2422(b), and petitioner's conviction could be affirmed. It stated:

> We have previously held that the term "induce" in § 2422 is not ambiguous and has a plain and ordinary meaning. *See United States v. Panfil*, 338 F.3d 1299, 1301 (11th Cir. 2003). "Induce" can be defined in two ways. It can be defined as "[t]o lead or move by influence or persuasion; to prevail upon," or alternatively, "[t]o stimulate the occurrence of; ***cause***." The Am. Heritage Dictionary Of The English Language 671 (William Morris ed., Houghton Mifflin Co. 1981). We must construe the word to avoid making § 2422 superfluous. *See Medberry v. Crosby*, 351 F.3d 1049, 1061 (11th Cir. 2003). To that end, we disfavor the former interpretation of "induce," which is essentially synonymous with the word "persuade." By negotiating with the purported father of a minor, Murrell attempted to stimulate or cause the minor to engage in sexual activity with him. Consequently, Murrell's conduct fits squarely within the definition of "induce."

Id. Notwithstanding the court's purported reliance on *Panfil*, the decision below actually contravenes rather than follows *Panfil*. By defining "induce" in § 2422(b) merely as "cause," the Circuit Court has rendered § 2422(b) void for vagueness and unconstitutionally overbroad. Moreover, the Circuit Court's choice of the ***harsher*** of two alternative definitions for "induce" without even considering the legislative history of § 2422(b),

unjustifiably ignores and therefore violates well-established authority requiring the Court to determine legislative intent in cases of statutory ambiguity, and where such intent is unclear – or at least if Congress has not clearly evidenced an intent to exercise the full extent of its Commerce Clause power to federalize conduct traditionally punished by the state – a statute must be interpreted narrowly, with lenity towards the defendant.

The panel's contrary approach to statutory construction in a published decision, and indeed, its choice of the harsher – rather than the more lenient – definition of an ambiguous statutory term, has created several direct intra-circuit conflicts, as well as conflicts with this Court's authority, on recurring issues of statutory construction.

In *Panfil*, the defendant claimed that the term "induce" in § 2422(b) was vague and overbroad, rendering the statute unconstitutional on its face. The Court rejected that claim, and – consistent with the Eleventh Circuit's dictates – avoided an unconstitutional reading of the statute,[1] by holding that the term "induce" "is ***not subject to varying standards***, as were the terms ["indecent" and "patently offensive"] in the CDA," and thus, would not "leave ordinary citizens to guess at what communications constitute illegal inducement." *Panfil*, 338 F.3d at 1301 (distinguishing *Reno v. ACLU*, 521 U.S. 8, 117 S.Ct. 2329 (1997)). Since "picking and choosing" between alternative definitions would ***not*** solve the problems of vagueness or

[1] *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 522, 92 S.Ct. 1103, 1106 (1972) (a "statute must be carefully drawn or ***be authoritatively construed*** to punish only unprotected speech and not be susceptible of application to protected expression.")

overbreath[2] – the Court instead held that the term "induce" simply had its "plain and ordinary meaning" in § 2422(b). *Id.* This "plain and ordinary" meaning, however, is necessarily the narrowest meaning, and ***excludes*** any alternative definitions, such as "cause" (itself, a term "subject to varying standards"). *Cf. Gooding, supra*, note 1 (invalidating as unconstitutionally vague and overbroad, a statute criminalizing the use of "opprobrious words or abusive language, ***tending to cause*** a breach of the peace," because the statute was not narrowly drawn to apply only to "fighting words" – "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"). To the extent that the Circuit Court chose the broader of two alternative definitions for the term "induce" in § 2422(b) – and indeed, a definition that is itself vague and subject to varying standards – its decision contravenes *Panfil*, and renders the statute unconstitutional on its face.

Assuming for the sake of this petition that both alternative definitions of "induce" identified by the Circuit Court here are constitutionally permissible, there is then an unavoidable statutory ambiguity, which – under established authority – must be resolved by legislative intent. *See United States v. McNab*, 331 F.3d 1228, 1238 (11th Cir. 2003) (and cases cited therein). To the extent that the

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[2] *See, e.g., Hunter v. Allen*, 422 F.2d 1158 (5th Cir. 1970) ("It does not meet [vagueness challenge] "to pick and choose one possible meaning of an imprecise word. The inability of the citizen to guess which of several meanings will be chosen by the courts, and law enforcement officers, creates the 'chilling effect' by which the citizen is constrained to refrain from doing what he may constitutionally do"), *cert. granted, judgment vacated, and remanded on different grounds sub nom. Embry v. Allen*, 401 U.S. 989 (1971).

Circuit Court resolved the statutory ambiguity without ***any*** inquiry into legislative intent, its decision contravenes *McNab* and well-settled rules of statutory construction.

In *McNab*, the statutory term "law" (like the term "induce" here), notably had ***several common definitions*** – both broader ones and narrower ones. *Id.* at 1937. The defendants in *McNab* urged the Court to apply the narrower definition, because the broader one would render a word in an earlier phrase meaningless, which would contravene the maxim that no statutory term is to be discarded as meaningless, or "mere surplusage." *See id.* While the Court found this reasoning to lead to ***one reasonable interpretation*** of the statute, it emphasized that it "was ***not*** the ***only*** reasonable one." *Id.* The same must be said with equal force here.

The lower court panel erred in assuming its interpretation of "induce" in § 2422(b) as "cause" to be the only reasonable one, because that interpretation would not make the term "induce" "synonymous with the word 'persuade.'" 2004 WL 944004 at *4 (citing *Medberry v. Crosby*, 351 F.3d 1049, 1061 (11th Cir. 2003)). Clearly, however, "[t]o ***lead or move by*** influence or persuasion; to prevail upon" is ***not*** actually ***synonymous*** with "persuade." It is similar. And in such a case, ***another*** maxim of statutory construction comes into play: *noscitur a sociis* – "a word is known by the company it keeps" – which dictates that a reviewing court construe a word capable of many meanings, by reference to the other words in the statute, to avoid the giving of unintended breath to the Acts of Congress. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582 (1961); *Gutierrez v. Ada*, 528

U.S. 250, 255 120 S.Ct. 740, 744 (2000) (following *Jarecki*; applying rule of *noscitur a sociis*).

Pursuant to *noscitur a sociis*, it is an ***equally reasonable construction*** of § 2422(b) that Congress chose each of the four verbs in § 2422(b) – "persuade," "induce," "entice," and "coerce" – to describe and criminalize a similar type of activity. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 1582 (1961) (term "discovery" used in statute was "a word usable in many contexts with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it. These words ["exploration" and "prospecting"] strongly suggest that a precise and narrow application was intended;" construing "discovery" – consistent with "exploration" and "prospecting" – to pertain to a narrowly-defined similar activity). A similar interpretation is certainly reasonable with respect to § 2422(b), given that Black's Law Dictionary actually defines the term "inducement" quite narrowly – as consistent with the terms "persuade" and "entice" – but ***not*** with "cause." *See* Black's Law Dictionary, Seventh Edition at 779 (1999) (defining "inducement" as "[t]he act or process of ***enticing*** or ***persuading*** another person to take a certain course of action").[3]

As in *McNab*, the "net result" of these various common definitions, maxims, and constructions, is that there are simply "***several reasonable ways to interpret the***

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[3] While the Court in *McNab* consulted ***both*** Merriam Webster's Collegiate Dictionary and Black's Law Dictionary for definitions of the word "law," *see* 331 F.3d at 1237, the panel here ***failed*** to consult Black's or consider how the term "induce" is commonly understood ***in legal parlance***.

term "induce," which render that term "ambiguous" as used in § 2422(b), and require that the Court "look beyond the language of the statute to consider legislative intent." *McNab*, 331 F.3d at 1238. To discern legislative intent, the Court must look " 'to the purpose of the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments whether accepted or rejected and the remarks in debate preceding passage.' " *Id.* at 1238 (citation omitted). Here, however, and in violation of the approach mandated by *McNab*, the Circuit Court ***failed*** to consider any of the available evidence as to Congress' intent – evidence making clear that Congress intended to pass a narrow statute, criminalizing ***only*** direct communications from adults to minors ***over the internet***.

In 1996, as part of the Telecommunications Act of 1996, Congress passed the Communications Decency Act of 1996 (CDA), whose stated purpose was to "protect minors from potentially harmful materials" received over the internet. *Reno v. ACLU*, 521 U.S. 844, 857, 871 (1997). Indeed, the Senate Conference Committee Report notes that both House and Senate amendments to § 2422 were intended to "protect children from ***harassing, indecent or obscene communications***," and that, "On July 24, 1995, the Senate Judiciary Committee held a hearing on ***online*** indecency, obscenity, and child endangerment. The record of this hearing supports the ***need to protect children and families from online harm***." S. Conf. Rep. 104-230 § 508 (Feb. 1, 1996) (App. 48-50).

At the outset of the July 24, 1995 hearing, entitled "Cyberporn and Children: The Scope of the Problem, the State of the Technology and the Need for Congressional Action," Senator Leahy framed the issue as being that of

regulating ***"the problem of children's access to objectionable online material."*** 1995 WL 435909 (App. 51) (Emphasis added). The testimony at the hearing, he noted, would address "the future of the Internet; ***the best ways for parents to control their children's access to the Internet and to protect against inappropriate and offensive materials***; the appropriate role of law enforcement." (App. 52) (Emphasis added). In fact, prior to the hearing, Sen. Leahy had asked "the Attorney General of the United States as well as a coalition of private and public interest groups known as the Interactive Working Group to look at these issues and provide recommendations on addressing the ***problem of children's access to objectionable online material*** in a constitutional and effective matter." (App. 52). That day, Sen. Leahy noted, the Interactive Working Group would be "releasing its report describing some of the technology available today to ***help parents supervise their children's activities on the Internet and protect them from objectionable material.***" (App. 52). He noted that there were several recently-available products which would ***"limit children's access to chat rooms, where they might be solicited."*** (App. 53).[4]

Senator Leahy, as well as Senator Feingold focused heavily upon these parental controls, because they had grave concerns that Congress ***not*** trample on First

[4] Several of the witnesses who testified at the hearing gave personal and anecdotal evidence of sexual predators approaching children online. *See, e.g.,* Testimony of Dee Jepsen, Executive Director, Enough is Enough, 1995 WL 435918 (App. 65-77); Testimony of Donnelle Grupp, a 15-year old girl who was a victim of an online stalker, 1995 WL 496896 (App. 78-79); and Testimony of Patricia Shao, a mother of two from Baltimore, Md., 1995 WL 435916 (App. 80-83).

Amendment adult-to-adult free speech rights. (App. 54-56); *see also* Statement of Sen. Feingold, 1995 WL 435910 (App. 57-61) ("I strongly urge my colleagues to exercise caution and restraint when considering legislative attempts to regulate free speech. We must look for ***solutions that empower parents to exercise more control over the types of information their children receive over computer networks.***") (Emphasis added). Senator Hatch, however, who had co-sponsored the bill (S. 892, titled the "Protection of Children from Computer Pornography Act of 1995"), attempted to assuage the other senators' First Amendment concerns, arguing that "***S. 892's carefully worded to limit its application to knowing, reckless or willful transmission of indecent material to children, while still permitting adults access to otherwise constitutionally protected materials.***" 1995 WL 435911 (App. 62-64) (Emphasis added).

Both the Conference Committee Report and the comments of these senators at the "Cyberporn Hearing" – particularly, the comments of the bill's sponsor, Senator Hatch – should definitively resolve any ambiguity as to the intended meaning of the term "induce," and the intended scope of § 2422(b). The Congressional goal here, as part of a Tele*communications* Act, was clearly the narrow one of protecting children from harmful ***communications*** that they themselves might receive directly ***over the internet*** (in the absence of parent supervision, in chatrooms, for instance).

Congress clearly was ***not*** seeking to protect children against abuse more generally, abuse by their parents, or abuse facilitated by their parents – criminal conduct traditionally, and adequately, punished by the states. Accordingly, it is an error of law for a reviewing Court to

simply assume that Congress intended to invoke the full extent of its Commerce Clause authority, so as to "effect a significant change in the sensitive relation between federal and state criminal jurisdiction," where it has not made a "clear statement" to that effect in the language of a statute or in the legislative history. *See United States v. Bass*, 404 U.S. 336, 349-350 (1971) ("the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision;" without a clear statement from Congress, Court would have to resolve uncertainty as to jurisdictional nexus in statute in favor of the narrow reading, so as to preserve "as an element of the offense a requirement suited to federal criminal jurisdiction alone"). Here, to interpret "induce" to broadly mean "cause," and to thus criminalize any "use" of the internet in a conspiracy to commit a sexual battery, or an attempted sexual battery on a child, would be a "substantial extension of federal police resources," and would "dramatically intrude upon traditional state criminal jurisdiction." *See Bass*, 404 U.S. at 350. There is no legal basis for the Circuit Court to have assumed such federalization of state crime here.

Had the problem of third-party solicitations "caused" by internet communications from an adult to a third-party parent of a minor, been brought squarely to the attention of Congress in 1996, ***and*** had Congress intended to federalize such "conduct readily denounced as criminal by the States," *Bass*, 404 U.S. at 349, 92 S.Ct. at 523, Congress would have made that intent clear either in the language of the statute – as it did, for instance, in the mail fraud

and money laundering statutes[5] – or at least, in the Senate debate. Here, however, by contrast to the mail fraud statute, Congress did ***not*** simply criminalize using the internet to "***cause***" a minor to engage in sex – it criminalized using the internet to "***induce***" that minor. And, by contrast to the money laundering statute, Congress required that the defendant actually ***use*** the facility of interstate commerce to "induce," not merely that the crime somehow "***involve the use***" of a facility of interstate commerce. Finally, as in *Bass*, there is no basis in the legislative history "for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed. . . . " 404 U.S. at 350, 92 S.Ct. at 524. Indeed, here there were noted First Amendment concerns (not present in the mail fraud or money laundering contexts), which halted Congress from drafting the new § 2422(b) any broader than necessary to

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[5] *See* 18 U.S.C. § 1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in a post office or authorized depository for mail matter, any matter of thing whatever to be sent or delivered by the Postal Service . . . or knowingly ***causes to be delivered*** by mail or such carrier . . . ***any such matter or thing***") (Emphasis added); 18 U.S.C. § 1956(c)(4)(B) (defining "financial transaction" for purposes of money laundering statute as "a transaction ***involving the use of*** a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree") (Emphasis added); *see generally United States v. Downs*, 870 F.2d 613 (11th Cir. 1989) (defendant is guilty of mail fraud even if he never uses the mails, so long as it is reasonably foreseeable to him that someone else will use the mails to further the scheme); *United States v. Oliveros*, 275 F.3d 1299, 1303-1304 (11th Cir. 2001) (Congress invoked full extent of its Commerce Clause power in enacting the money laundering; plain meaning of "involving the use of a financial institution" is that the "use" need not be an "integral or essential part of the particular transaction which forms the basis of the conviction, but only that the transaction involve the use of the institution in some way;" any "incidental involvement or use [of a financial institution] is enough").

achieve its stated purpose of protecting children from online harm. Senator Hatch's assurance to his colleagues – that his bill was "***carefully worded to limit its application to knowing, reckless or willful TRANSMISSION of indecent material to children***" – should assure this Court that the intended meaning of "induce" was the narrowest possible one. There is simply no legal or factual basis for inferring that Congress' choice of the term "induce" in § 2422(b) was intended to make § 2422(b) farther-reaching. Accordingly, this Court should vacate the Circuit Court's decision, and hold – consistent with the "Clear Statement Rule" – that the term "induce" as used in § 2422(b) must be construed narrowly (like "persuade," "coerce," and "entice") to require that the defendant directly communicate with a minor ***online***.

Ultimately, even if the Circuit Court has doubt as to Congressional intent, it is well-settled that a court is then to apply the more lenient interpretation of the statute – never the harsher one. *See McNab*, 331 F.3d at 1249 note 21 (lenity is required if " 'a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute' "); *see generally Bass*, 404 U.S. at 347-348, 92 S.Ct. at 522-523 (rule of lenity is founded on principle that law should give "fair warning" "of what the law intends to do if a certain line is passed," and concern that "legislatures and not courts should define criminal activity").

A ***harsher*** construction by the Eleventh Circuit, is contrary to longstanding decisions of that Court, and potentially this Court, and ultimately has effected a major, and dangerous change in the law.

This sting did not give petitioner the opportunity to violate the statute because it omitted the child-to-predator nexus as required by petitioner's interpretation of the law.

II. TO DETERMINE WHETHER EXISTING SENTENCING GUIDELINES EHANCEMENTS CAN BE IMPOSED WHERE THE VICTIM IS FICTITIOUS, AND ANY CONTACT BY THE PETITIONER WAS VICARIOUS.

The District Court and the circuit court, in a matter of first impression in the federal courts, linked a sting's fictitious victim to prohibited indirect victim contact and thus wrongfully created a legal fiction to justify two two-level sentence enhancements.

The United States Sentencing Guidelines Commission commentary to Section 2G1.1(b)(2)(B) defines the word "victim." As a result the decision reached below is that in addition to the primary offense level for the underlying offense a defendant may be more harshly treated by two levels because he or she had the intent to induce a minor, between the ages of twelve and sixteen. Similarly, a second two-level enhancement under United States Sentencing Guidelines Section 2G1.1(b)(5) is deemed proper based on a defendant's use of a computer to communicate with a person who exercises control over a minor, in this case the communicating via computer with the portrayed father of a minor

The error in this double-double enhancement blueprint is that a defendant gets additional punishment for conduct he or she did not actually do, nor attempt, because the sting employed by law enforcement did not afford

petitioner the opportunity to do, or not do, that which is prohibited.

Simply stated it is petitioner's position that he should be punished for what he actually did which in this case the court ruled was in violation of the underlying statute.

Indeed, it is through examination of the sentencing scheme examined in this issue that the fundamental problem of the issue in the first question is most clearly amplified.

The facts do not fit the crime, nor the punishment with the enhancements.

The sting could have utilized the play-acting child's role to give petitioner the opportunity to qualify for these enhancements. It did not, for whatever reasons, and he should not therefore have received enhanced punishment for that which he did not do.

CONCLUSION

Based upon the foregoing argument and citations of authority, this Court should reverse and remand petitioner's conviction, and direct the Eleventh Circuit to withdraw its opinion, and ultimately direct the Eleventh Circuit to direct the District Court to vacate petitioner's conviction, judgment, and sentence

Should the District Court and the Circuit Court be affirmed as to Issue I, petitioner asks that the case be

remanded as to Issue II, and he be re-sentenced based on a four-level reduction, and recalculation of his sentence.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12582

D. C. Docket No. 02-14077-CR-DLG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY F. MURRELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed May 4, 2004)

Before WILSON and KRAVITCH, Circuit Judges, and GOLDBERG*, Judge.

WILSON, Circuit Judge:

Anthony Murrell appeals his conviction under 18 U.S.C. § 2422(b) for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

a minor to engage in unlawful sexual activity. Specifically, Murrell argues that his conduct – making an online deal with a purported adult father to have sex with the father's minor daughter – is not within the purview of § 2422, and that certain sentencing enhancements were improperly applied. Upon careful review, we affirm Murrell's conviction and sentence.

Background

In September 2002, Appellant Anthony Murrell ("Murrell"), under the screen name "Bone 1031," entered two separate America Online ("AOL") chat rooms in which he communicated with undercover Detective Neil Spector of the St. Lucie County Sheriff's Office.

On September 16, in the "family love" chat room, Murrell engaged in an online chat with Spector, who was posing as the adult mother of a thirteen year-old daughter. During their exchange, Murrell expressed an interest in meeting the mother and daughter for a "discreet sexual relationship." In a subsequent email, he stated, "I would like to be able to get intimate with you and [your daughter] if the spark is there," and provided his phone number.

On September 18, while Detective Spector was in a chat room entitled "Rent F Vry Yng," in an undercover capacity as an adult male with a fictitious teen daughter, he received another message from Murrell. Murrell wrote: "Hi. Are you renting daughter?" Spector responded that his daughter was thirteen years old. Murrell then wrote that he lived near Orlando and asked if "the daughter enjoyed being rented." He also inquired whether the daughter had had sex yet, and questioned whether she would "go along." Spector asked Murrell whether he was

serious and what he had to offer. Murrell suggested that the two speak on the phone, and gave Spector his phone number. Spector also gave Murrell his undercover phone number.

Spector called Murrell and asked him whether he was sincere in his interests and whether he was a "cop." Murrell replied that he was sincere, but that he wanted the same assurances from Spector. During the conversation, Murrell explained his intentions. He expressed that he wanted to have oral sex and intercourse with the daughter, and stated, "what I actually recommend is maybe once or twice, just me and her."

Over the next few days, Murrell and Detective Spector communicated online and by telephone, culminating in an agreement that Murrell would meet Spector and his purported daughter at 5:00 p.m. on September 24 at the Vero Beach Holiday Inn, and that Murrell would pay Spector $300.00 for sex with the minor.

At approximately 5:05 p.m. on September 24, Murrell arrived at the Vero Beach Holiday Inn and met with Detective Spector who was acting in his undercover capacity. Murrell showed Spector a teddy bear he had brought for the daughter. He was also carrying $300.00 and a box of condoms. Murrell indicated that he was ready to meet the girl, and was arrested as he walked toward a hotel room in which he believed the minor was waiting.

On October 3, 2002, a federal grand jury in Ft. Pierce, Florida returned an indictment charging Murrell under 18 U.S.C. § 2422(b). Murrell initially pled not guilty. On February 6, 2003, he filed a motion to dismiss the indictment, in which he stipulated to certain facts, but claimed that his actions were not criminal under § 2422. After

holding a hearing on the matter, the district court denied his motion. Murrell entered a conditional guilty plea on February 19, 2003, without the benefit of a written plea agreement. As a condition of his plea, he preserved his claim that his stipulated conduct did not violate § 2422.

On April 23, 2003, the district court held a sentencing hearing, in which it overruled Murrell's objections to the two two-level sentencing enhancements under U.S.S.G. § 2G1.1(b)(2)(B) and (b)(5) recommended in his PSI. Murrell was sentenced to a 33-month term of imprisonment, to be followed by a three-year period of supervised release. The court also ordered him to participate in sex offender and mental health treatment programs, and imposed restrictions on his use of computers.

Murrell now appeals, asserting that the district court erred in denying his motion to dismiss his indictment, and in applying the two sentencing enhancements. He claims that because he did not directly communicate with a minor or person he believed to be a minor, his conduct was not criminally proscribed by the language of § 2422(b).

Standards of Review

The interpretation of a statute is a question of law subject to *de novo* review. *United States v. Pistone,* 177 F.3d 957, 958 (11th Cir. 1999).

We review purely legal questions concerning use of the Sentencing Guidelines *de novo. United States v. Williams,* 340 F.3d 1231, 1234 n.8 (11th Cir. 2003). Except in certain cases in which the lower court departs from the applicable Guideline range, we review a district court's application of the Guidelines to the facts with "due deference." 18 U.S.C.

§ 3742(e); *see also United States v. White*, 335 F.3d 1314, 1317 (11th Cir. 2003).

Discussion

A. *Violation of § 2422(b) Where the Defendant Does Not Communicate Directly with a Minor or Supposed Minor*

As a matter of first impression in the federal circuit courts, we must determine whether a defendant who arranges to have sex with a minor through communications with an adult intermediary, by means of interstate commerce, violates § 2422(b).

Section 2422(b) states, in relevant part:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, *or attempts to do so,* shall be fined [and imprisoned].

18 U.S.C. § 2422(b) (emphasis added).

Murrell was convicted for attempt under the statute because there was no actual minor involved who could have been influenced. He concedes that use of AOL chat rooms and instant messaging satisfies the interstate commerce element of the offense because his communications with Detective Spector traveled through an AOL server based in Virginia. However, he argues that § 2422(b) does not otherwise encompass his conduct because, in his view, one must communicate directly with

a minor or supposed minor in order to violate the statute. We disagree.

In *United States v. Root,* 296 F.3d 1222 (11th Cir. 2002), *cert. denied,* 537 U.S. 1176 (2003), we upheld an attempt conviction under § 2422(b) where a defendant believed he was communicating with a minor, but was actually communicating with an undercover government agent. *Id.* at 1227-28. Murrell contends that *Root* is distinguishable from his case because it involved direct communication between the defendant and the purported minor. However, we fail to recognize how this factual discrepancy is relevant to the disposition of the charges against Murrell.

To sustain a conviction for the crime of attempt, the government need only prove (1) that the defendant had the specific intent to engage in the criminal conduct for which he is charged and (2) that he took a substantial step toward commission of the offense. *See United States v. Baptista-Rodriguez,* 17 F.3d 1354, 1369 (11th Cir. 1994); *see also Root,* 296 F.3d at 1227-28. For example, we have stated that a conviction for attempted importation of marijuana requires proof of "a specific intent to import marijuana" and a substantial step towards the importation. *See United States v. Collins,* 779 F.2d 1520, 1527 (11th Cir. 1986).

Combining the definition of attempt with the plain language of § 2422(b), the government must first prove that Murrell, using the internet, acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex. The underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the

minor rather than the sex act itself.[1] That is, if a person *persuaded* a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any sex act himself, he would nevertheless violate § 2422(b).[2]

In *United States v. Bailey,* 228 F.3d 637 (6th Cir.2000), the Sixth Circuit addressed this very issue. The defendant in *Bailey* contended that attempt under § 2422(b) "requires the specific intent to commit illegal sexual acts rather than just the intent to persuade or solicit the minor victim to commit sexual acts." *Id.* at 638. In response, the court held:

> While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves. Hence, a conviction under the statute only requires a finding that the defendant

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[1] In contrast, we note that 18 U.S.C. § 2423(b) prohibits interstate travel "for the purpose of engaging in any illicit sexual conduct with another person." 18 U.S.C. § 2423(b) (2004). To violate this statute, the defendant must intend to engage in unlawful sex.

[2] Some courts, however, have not made such a distinction. *See, e.g., United States v. Farner,* 251 F.3d 510, 513 (5th Cir. 2001) ("[T]he district court correctly concluded . . . that Farner intended to engage in sexual acts with a 14-year-old girl and that he took substantial steps toward committing the crime."). Even if we were to require the government to prove that Murrell acted with the specific intent to engage in sexual activity with a minor, our result would remain unchanged. Murrell's conduct clearly indicates that he not only intended to induce a minor to engage in sexual activity, but that he also intended to proceed to engage in unlawful sex acts with the minor.

> had an intent to persuade or to attempt to persuade. Defendant Bailey's attack is therefore meritless.

Id. at 639. Thus, to satisfy the first element of attempt, we must determine whether Murrell acted with the intent to persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. Because we view Murrell's actions as those of inducement rather than persuasion, enticement, or coercion, we will focus upon that component.

Murrell asserts that he could not have intended to induce a minor to engage in illegal sex acts without actually speaking to a person he believed to be a minor. Put another way, Murrell contends that the minor's inducement may not be effected indirectly via an intermediary, and that accordingly, he could not have intended to induce a minor to engage in sex by speaking only to a go-between.

We have previously held that the term "induce" in § 2422 is not ambiguous and has a plain and ordinary meaning. *See United States v. Panfil,* 338 F.3d 1299, 1301 (11th Cir.2003). "Induce" can be defined in two ways. It can be defined as "[t]o lead or move by influence or persuasion; to prevail upon," or alternatively, "[t]o stimulate the occurrence of; cause." THE AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 671 (William Morris ed., Houghton Mifflin Co.1981). We must construe the word to avoid making § 2422 superfluous. *See Medberry v. Crosby,* 351 F.3d 1049, 1061 (11th Cir.2003). To that end, we disfavor the former interpretation of "induce," which is essentially synonymous with the word "persuade." By negotiating with the purported father of a minor, Murrell attempted to stimulate or cause the minor to engage in

sexual activity with him. Consequently, Murrell's conduct fits squarely within the definition of "induce."

Moreover, we note that the efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary to carry out his intended objective. In this case, Murrell communicated with an adult who he believed to be the father of a thirteen-year-old girl and who presumably exercised influence over the girl. Murrell's agreement with the father, who was acting as an agent or representative, implied procuring the daughter to engage in sexual activity. Because we find that Murrell acted with the intent to induce a minor to engage in unlawful sexual activity, the first element of attempt is satisfied.

Next, we turn to the second element of attempt – whether Murrell took a substantial step toward his intended goal of inducing a thirteen year-old girl to engage in sexual activity with him. To find that a substantial step was taken, the court must determine that the defendant's objective acts mark his conduct as criminal such that his acts as a whole strongly corroborate the required culpability. *United States v. Forbrich,* 758 F.2d 555, 557 (11th Cir.1985). Murrell's objective acts strongly corroborate his culpability and provide clear evidence that his conduct was criminal. Murrell (1) made several explicit incriminating statements to Detective Spector;[3] (2) traveled two

[3] Note that, in *Bailey,* the Sixth Circuit upheld an attempt conviction under § 2422(b) where the defendant, via online communications, merely tried to convince minors to meet him for sex acts, but none of them were actually persuaded. Thus, the *Bailey* court reasoned that the "substantial steps" that strongly corroborated the defendant's intent to persuade the minor victims were simply the solicitous messages he sent to them; no travel or additional acts were required to satisfy the

(Continued on following page)

hours to another county to meet a minor girl for sex in exchange for money; and (3) carried a teddy bear, $300.00 in cash, and a box of condoms when he arrived at the meeting site. His actions, taken as a whole, demonstrate unequivocally that he intended to influence a young girl into engaging in unlawful sexual activity and that his conduct was therefore criminal. Thus, Murrell took a substantial step toward inducing a minor to engage in illicit sexual acts, thereby satisfying the second element of criminal attempt.

Because we find that direct communication with a minor or supposed minor is unnecessary under the text of § 2422(b), and that Murrell's conduct satisfied the elements of attempt, we hold that such conduct was in violation of the statute.

B. Two-level Sentencing Enhancement Under U.S.S.G. § 2G1.1(b)(2)(B)

Murrell received a two-level sentencing enhancement under U.S.S.G. § 2G1.1(b)(2)(B) for an offense involving a "victim" between the ages of twelve and sixteen. The commentary to § 2G1.1 defines the word "victim" as follows:

> "Victim" means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether

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"substantial step" requirement. *See Bailey*, 228 F.3d at 640. We need not reach the question whether communication via a means of interstate commerce, without more, is sufficient to sustain a conviction for attempt under § 2422(b) because Murrell engaged in objective acts in addition to his communications with Detective Spector.

> or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

U.S.S.G. § 2G1.1, cmt. n.1 (2003).[4] In this case, we have neither an actual victim nor an undercover law enforcement officer "victim." We must therefore determine whether the increased sentence is justified where there is only a fictitious victim. No circuit has yet considered this question.[5]

Because the Sentencing Commission specifically provided that undercover officers are "victims" for purposes of § 2G1.1, we deduce that the enhancement is directed at the defendant's intent, rather than any actual harm caused to a genuine victim. In terms of the defendant's intent, as well as any actual harm done, there is no difference between an undercover officer victim and a

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[4] Commentary and Application Notes to the Sentencing Guidelines are binding on the courts unless they contradict the plain meaning of the text of the Guidelines. *See Stinson v. United States*, 508 U.S. 36, 38 (1993).

[5] In *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000), the Seventh Circuit upheld a similar enhancement under U.S.S.G. § 2A3.1 for a "fictional victim" under a plain error standard. The court noted that no circuit had considered the issue, and stated, "[c]onsidering the lack of case authority on this issue, we conclude that, if there was error, Angle cannot demonstrate . . . that the error was 'clear or obvious' (in other words, that 'a legal rule was violated during the district court proceedings')." *Id.* at 346 (citations omitted). Section 2A3.1 does not define the word "victim."

Previously, the Ninth Circuit mentioned that a lower court had declined to apply § 2A3.1 because the victims were fictional. *See United States v. Butler*, 92 F.3d 960, 963 n.6 (9th Cir. 1996). The *Butler* court, however, never addressed the meaning or scope of the term "victim" and made no ruling on this question.

fictitious victim. Thus, the enhancement applies whether the minor "victim" is real, fictitious, or an undercover officer.[6] Murrell's two-level sentencing increase under § 2G1.1(b)(2)(B) is appropriate.

C. Two-level Sentencing Enhancement Under U.S.S.G. § 2G1.1(b)(5)

Murrell also received a two-level enhancement under U.S.S.G. § 2G1.1(b)(5), which states:

> If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by 2 levels.

U.S.S.G. § 2G1.1(b)(5) (2003). Murrell argues that this enhancement is inapplicable to him, again relying on the fact that he expressed no inducement directly to a minor, via the internet.

We find, however, that the sentencing increase under subsection (b)(5) applies. As mentioned above, inducement of a minor under § 2422(b) may take place indirectly. Since Murrell used his computer to communicate with Detective Spector for the purpose of inducing a thirteen-year-old girl

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[6] In addition, when the Commission amended U.S.S.G. § 2A3.2 to clarify that a "victim" includes an undercover officer, it noted that "[t]his change was made to ensure that offenders who are apprehended in an undercover operation are appropriately punished." U.S.S.G. MANUAL, supp. to app. C, amend. 592 at 50 (2000).

to engage in a commercial sex act[7] with him, § 2G1.1(b)(5)(A) applies.[8]

Our conclusion is further supported by the commentary to § 2G1.1 regarding subsection (b)(5)(A):

> Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with a minor *or with a person who exercises custody, care, or supervisory control of the minor.* Accordingly, the enhancement in subsection (b)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.

§ 2G1.1, cmt. n.8 (emphasis added). The commentary clearly indicates that the enhancement is intended to apply to instances in which the defendant communicates with the parent of a minor, provided of course that the parent exercises custody, care, or supervisory control over the minor. Murrell believed that Detective Spector, in his undercover capacity, exercised such authority over his minor "daughter." Murrell's dealings with Detective Spector were premised on his assumption that Detective Spector was in a position to direct or command the actions of the "daughter." Based on the plain language of the Guideline and its commentary, we hold that Murrell's two-level sentencing increase under § 2G1.1(b)(5) is proper.

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[7] A "commercial sex act" is "any sex act, on account of which anything of value is given to or received by any person." § 2G1.1, cmt. n.1; 18 U.S.C. § 1591(c)(1). Because Murrell planned to exchange $300.00 for sex acts with a minor, his conduct falls within the scope of this definition.

[8] Because subsection (A) of § 2G1.1(b)(5) applies, we need not consider the applicability of subsection (B).

Accordingly, we affirm Murrell's conviction and sentence.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case **02-14077**-*CR-DLG*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY MURRELL,

Defendant.

FT. PIERCE, FLORIDA

FEBRUARY 18, 2003

TRANSCRIPT OF PLEA COLLOQUY
BEFORE THE HONORABLE DONALD L. GRAHAM,
UNITED STATES DISTRICT JUDGE

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[3] **THE DEPUTY CLERK:** *United States versus Anthony Murrell*, 02-14077 – Criminal – Graham.

THE COURT: Would you like a few moments, counsel?

MR. RUTBERG: Thank you, Your Honor. Thank you, Judge Graham.

[Counsel and the defendant confer.]

THE COURT: Are you ready to proceed, counsel?

MR. RUTBERG: Yes, Your Honor I am.

THE COURT: Please call the case.

THE DEPUTY CLERK: *United States versus Anthony Murrell*, 02-14077 – Criminal – Graham.

THE COURT: Appearances, please.

MR. JOHNSON: Mark Johnson, appearing for Assistant U.S. Attorney Robert Waters, for the United States. With me at counsel table is the case Agent Chris Harvey of the United States Customs Service.

Is it still that? I think it is for another couple of weeks.

MR. RUTBERG: Your Honor, Gerald S. Rutberg, counsel for Anthony Murrell.

THE COURT: Mr. Murrell, your counsel has filed a motion to dismiss. I suppose we should entertain that at this time.

I do have a stipulated facts section included in the motion. However, I am wondering if this is, in fact, the [4] stipulated facts the Government agrees to and, secondly, are there additional facts, such as, perhaps, the transcripts of all of the conversations that were recorded in this cause or printed out as a result of the interstate commerce traffic, more specifically, Internet conversations.

MR. RUTBERG: Your Honor, for purposes of this motion, I have no objection. To my knowledge, there is no transcript of them.

I have seen and been provided by Mr. Waters full discovery. I have had the videotape and three audio tapes from, if I am correct, the 18th, 23rd and 24th of September, and if the Court would like to have those in the record, I would have no objection.

THE COURT: I think that would be appropriate. We have exhibits marked for identification.

Are there three individual conversations, counsel?

MR. RUTBERG: Your Honor, there are three videotapes of dates and the video and each of them is marked with a date on the exterior.

This involves three telephone conversations that were conducted in this matter. There is also a videotape of the, the take-down in Vero Beach, Your Honor. These are what I was provided and I also made a copy, but I have no objection to tendering these. I do not have a transcript of them.

THE COURT: Any objection, counsel?

[5] **MR. JOHNSON:** I don't have an objection and, of course, I am operating under a little bit of a handicap here, but I do have an eight page statement from the undercover police officer that I am assuming Mr. Rutberg has seen, but I am going to hand it to him and see if that is correct.

It would be what he would testify to. It is consistent with the stipulated facts.

THE COURT: I am going to receive the taped exhibits as 1 through 4 for identification. The videotape will be Exhibit 4, the audio tapes 1, 2, 3.

[Government Exhibits 1, 2, 3, 4 marked for identification].

MR. RUTBERG: Just for the record, the dates I recited, let me confirm them. One tape is for September 18th, Madam Clerk, if I may.

The second is for September 21st. The third is for September 23rd, and the videotape is for September 24th, Your Honor.

May I?

THE COURT: Yes, sir.

They are received as marked, September 18th, Exhibit 1. September 21st, Exhibit 2. September 23rd will be Exhibit 3, and the videotape will be Exhibit 4.

[Government Exhibits 1, 2, 3, 4 received in evidence].

MR. RUTBERG: Your Honor, this document that I have been handed by the Government, it may be similar to the [6] affidavit that was presented at the time the arrest was made, but I have not had an opportunity to compare it and would need a few moments to do so.

MR. JOHNSON: Your Honor, I believe I have discovered in the file the various transcripts which would not contain so many conclusions.

THE COURT: Do you have four transcripts or one?

MR. JOHNSON: I have one for Wednesday, September 18th.

THE COURT: We will mark that Exhibit 1 A.

MR. JOHNSON: For Thursday, September 19th –

THE COURT: Well, that is not one that is –

MR. JOHNSON: That is a conversation. One from Friday, September 20th. That would be number 3.

One from Saturday, September 21st. One from Monday, September 23rd. One from Tuesday, September 24th.

So, a total of six all together which I believe since I got it out of the discovery file were given in discovery.

They don't seem to match the tape-recordings. Are they in addition to?

I think they are in addition. These are recitations of the computer conversations. There were additional actual phone calls as well.

THE COURT: All right. I will receive the six exhibits as Exhibit [sic] 5 through 11.

[7] [Government Exhibits 5 through 11 marked for identification].

[Government Exhibits 5 through 11 received in evidence].

MR. RUTBERG: Your Honor, if I may? I have a complete set of the discovery materials. If I could just scan just a second to make sure that it matches what I have received.

Judge, I have received these items. Of course, the tapes would be the best evidence, but for purpose of this hearing I would have no objection to the Court seeing this as well.

THE COURT: All right. These transcripts will be marked 5 through 10. There is 6 is that correct. Received as marked.

In addition, of course, the Court will consider the stipulation of facts submitted by defense counsel in trying to make a determination in this cause.

MR. RUTBERG: Your Honor, I was going to give back to the Government this item which they originally started with, which I think has some editorial comment together with the material.

They have not sought to submit it.

THE COURT: All right, counsel.

I have received your pleadings as they relate to the issues that the Court has to determine in this case. It would appear that the *Bonner* case and the *Root* case are directly on [8] point in this cause.

I understand defense counsel's argument. However, it appears as though Congress has sanctioned certain conduct with regard to 18, United States Code, 2422(b).

It really is not significant as to what action takes place by the Government agent or the Government side of the factual scenario.

It appears that the Court has to determine if the defendant had the specific intent to commit the crime and what the defendant's mental process happened to be and,

secondly, whether or not the defendant took a substantial step in trying to accomplish the act.

Now, given that general scenario, I will give both counsel a few moments to make any additional arguments beyond those which were set forth in your written pleadings.

Counsel.

MR. RUTBERG: If I may, Judge? May I address the Court from right here, not from this bench.

THE COURT: Yes, sir.

MR. RUTBERG: I would like to return to the threshold issue, and I recognize *Farner* and *Root* are right on point, generally. However, in both of those cases there was substantial communication between the defendant and the purported minor.

In both of these cases, the Courts go to some length, [9] and particularly in *Root*, page after page of communication between the defendant and the alleged child.

This case is different. It is a quantum leap from that because no matter what else Mr. Murrell did in those days, he never ever communicated with a child or anyone purporting to be a child.

The Appellate Court has, in my view, based on the amendment to allow an attempt, stretched the statute to allow the Government to use an undercover agent to portray that role, but in this case that entire requirement one would see is not even reached.

I would keep this very simple and straightforward and say to the Court that no where in the record is there ever

any of these elements right straight from the statute where he, when you allude to the language, where he has any communication with, persuaded, induced, enticed or coerced any individual who has not attained the age of 18 years to engage in prostitution or any sexual activity.

Judge, this is conduct dealing with, for a father acting here as – I will apologize to the Court – a pimp, more or less, prostituting his own child –

THE COURT: Oh, I have heard much worse than that, counsel.

MR. RUTBERG: I don't mean to offend.

In any event, the difference is in each of these [10] cases, and every case I have looked at, the collateral cases, the case that Judge Kennedy from the 6th in writing this opinion looks back to the Orlando case and talks about these issues, attempts, and the general like it, but here, Judge, there is a clear wall and the wall is that Mr. Murrell never communicated with any person who was a child or portraying themselves as a child, and until that would occur I would say that this statute can't apply.

The answer is, looking at it as citizens, would we want this, the conduct that he did, could it be made into a crime? Perhaps it could. But I say to this Court that what his conduct was does not meet this statute, nor the cases under it.

It is a very large distinction between communication with a third party, and that's what I would call this. This is total third party communication, and if you think of it in practical terms, you have got a third party who supposedly, in theory, is communicating, whispering in the ear or shouting at a nonexistent, nonexistent child or a person

portraying a child. That, I think, is the essence of the argument. Everything else is outlined here.

If I may to help the Court a little bit more, if I may? Try to look from the back to the front. I always like to look at these cases of this type from the Guidelines backward.

If you look at the Guideline potential enhancements, [11] he clearly doesn't fit any of those categories because there was never any child he communicated with or that he attempted to communicate with because there was a nonexistent feature.

I would say to the Court those enhancements would not apply in this case, and taking that back to the issue of an attempt – we are talking strictly here about an attempt. That's all – you cannot, cannot have an attempt under this statute where there is not the ability by the Government to plug in the element of the key thing.

This is under the Communications Act that it was amended. This is all designed to deal with the Internet and, of course, in the *Root* case, they argued it, but in *Root* they didn't have, what I would say, the benefit of no contact. They had wide contact, very explicit contact with the child. In this case, no contact whatsoever.

Mr. Murrell's first potential contact of any sort with any child would potentially have occurred either if the Government had chosen online to plug in or on the phone to plug in, or even at the motel, to plug in an agent or anybody else acting in that capacity.

Failing in that, I would say to the Court that even in the face of *Root* and *Farner*, that the Court ought to reasonably rule that you are not going to extend this statute to conduct with third parties because without it,

the contact only with the third party agent, this statute, in my humble view, is not [12] violated.

This is clearly distinguishable from *Root* and *Farner* and in many ways. I wish this fact pattern had come to the attention of the two Appellate Courts before *Farner* and *Root* were decided because I think it would be a lot easier to draw a white line than maybe today.

But my white line would be exclusive contact with a third party and a nonexistent, nonexistent child or fake child does not meet this statute.

That would be the essence of what I would tell the Court.

Thank you, Judge.

THE COURT: Government.

MR. JOHNSON: Your Honor, I would simply refer to the same language the Court referred to that is in *Root*, namely at 296 Federal 3d, pages 1227 and 1228:

> "This Circuit has long held that to convict a defendant of the crime of attempt, the Government need only prove, first, that the defendant was acting with the kind of culpability otherwise required for the commission of THE crime for which he is charged with attempting."

In that respect, the gravamen of this offense is attempting to induce, entice, persuade coerce a person who has not attained the age of 18 years to engage in sexual activity, and it specifically charges this was an attempt.

[13] The defendant arrived in Vero Beach with $300 which he was to pay the individual, a box of condoms,

which he had been required to bring, and a teddy bear as a gift to the minor.

I think that in and of itself shows exactly what the Government has to establish, that this defendant had the specific intent to engage in the underlying criminal conduct, that is, to have sex with a minor.

With respect to the second element the Court mentioned that specifically referred to in *Root*, the defendant was engaged in conduct that constitutes a substantial step toward the commission of the crime.

The Government would say that the fact that he traveled from Lake County to Vero Beach is a substantial step. He arrived with the requisite criminal intent, and under the circumstances, the fact that the actual colloquy concerning the attempt was done through a third person, although it was indirect, it was, the defendant understood that this person had the ability as a parent to deliver this fictional 13-year-old child.

I see the defendant's arguments as a distinction without a difference.

THE COURT: Thank you very much for your arguments, counsel.

MR. RUTBERG: Could I respond ever briefly.

THE COURT: Yes, sir.

[14] **MR. RUTBERG:** I will respectfully ask the Court, both of these cases, *Root* and the *Orlando* case, which *Root* cites briefly – they are great legal scholars – I would ask the Court to look at the language dealing with

attempts in the *Orlando* opinion cited in *Root* as an underlying matter the Court needs to distinguish.

There you are talking about the era of factual versus legal impossibility and this old troubled area of attempts and how the Courts have tried to grapple with it, and I think this is a good case in which to make, follow *Orlando* and distinguish *Root* and *Farner* by clearly seeing that the line should be drawn where there is exclusive contact with a third party, not the minor, and I think I could read the statute as amended and every time I read it I say "Where did this man meet any attempt of this conduct through any of these means?" and I respectfully suggest to the Court while – I know how the Government liked to make this crime – maybe Congress would like to make this – this would be an area dealing with prostitution of children in which this kind of case at the State level, the father of the child would likely be prosecuted, but they haven't done it and I would suggest if this is the case that causes Congress to act, all well and good, but this distinction between *Root* and *Farner* is clear and this gentleman should be freed as regards this charge.

Thank you.

[15] **THE COURT:** Thank you again.

As you all are aware, prior to 1998 the conduct in this case, the specific conduct charged at least, would not be a Federal crime.

Of course, in 1998 Congress added the "or attempts to do so" language to the statute which increased the parameters of conduct that would be governed by Title 18, United States Code, 2422(b).

The gravamen of the offense is the defendant's intent, and I believe Congress has made it clear that the Court has to make a factual determination, or the fact-finder has to make a factual determination, as to whether or not clearly, unequivocally the defendant had the intent to commit the crime.

So, we have to look at several facts to make that determination.

In the communications between the defendant and the undercover operative as set forth in the exhibits, including the transcripts, the audio and videotapes, as included in Exhibits 1 through 10 and the stipulated facts clearly show that the defendant had the intent to engage in sexual conduct with a person who had not attained the age of 18.

The defendant expressly states what he would like to do, and so it is clear that he had that intent.

In addition, his intent is demonstrated by actually traveling to the site of the proposed crime and coming with, as [16] the Government stated, and as stipulated to, certain materials, including the condom and the teddy bear and the $300 which was going to be given to the parent of this alleged child.

These facts satisfy the first element, that is, the specific intent and whether or not the defendant had such intent and, secondly, these facts demonstrate substantial steps to commit the crime.

Congress wanted Courts to be careful and to make sure that the defendant was actually going to commit the crime, not just some mere discussion about what would be done, but taking some substantial steps, not just steps, but

substantial steps, and traveling the distance in this case with the requested items, including the money, demonstrate such a substantial step.

So, in essence, the Court believes it is not so significant as to what the undercover agent was saying or what role the undercover agent was playing. It was whether or not the defendant had the specific intent to commit the crime.

As stated, based upon the facts in this case, the Court so finds and determines that *United States versus Bonner* and *United States versus Root*, which was decided not too long ago, July of last year, that these cases govern the conduct in this case and, of course, persuade the Court that the motion to dismiss the Indictment in this cause should be denied, and that is the Order of this Court.

[17] Now, having said that, counsel, how shall this case be disposed of and what specific agreement is there between the parties?

MR. RUTBERG: Judge, without Mr. Waters here I would not want to misrepresent, but I will do my best.

My intention is, if the Court permits it, because the rule requires both the Government to agree and the Court to agree, that the Court's denial of this motion can be reserved for any further appellate review. Mr. Murrell would choose to seek, and it is as I can see from the cases, a case of first impression as far as his particular fact pattern, and so we would, if I see it correctly, we would enter a Rule 11(b)(2), I believe, is the rule, conditional plea.

This would, of course, on the one hand, give Mr. Murrell the benefit of, you know, acceptance of responsibility and those credits and, on the other hand, negate the necessity of a trial in this case.

My aim as his counsel is to do the best I can to preserve the issue because this is pending I think, this process is being used in other Districts and other Circuits and sooner or later there will be, perhaps, a Supreme Court decision on, you know, where these lines are drawn, Your Honor, and I respect the Court's decision.

I recognize *Root* to be so very much influential, as well as *Farner*, the previous case.

[18] I think Mr. Waters is going to return next week. We need to get a written plea agreement together, but I would be prepared to proceed today.

Mr. Waters and I – he has had an open door to me in this case. I have been here a half dozen times to meet with him. I would like to make sure our plea agreement is as we have agreed to in the case, Judge.

THE COURT: Well, the Government is represented by substitute counsel. I am sure Mr. Waters discussed these issues with present counsel.

What is your position?

MR. JOHNSON: My position, Your Honor, is the Government doesn't object to this 11(b)(2) plea and doesn't object to the defendant receiving credit for acceptance of responsibility.

But I am not aware of any other plea agreement or any other matters which Mr. Waters does agree to.

I understood he was going to, the defendant was going to enter into a plea based on the parameters that I have just stated.

MR. RUTBERG: You stated correctly. That's fine. I wanted to make sure the acceptance of responsibility issue was clear, that he would get the benefit of it.

There will be a later, I guess, fight, a question how he gets scored here if there is an attempt made to bump him up.

[19] Let's take that up when it becomes ripe.

I also cited to the Court 11(b)(2). Actually, it is 11(A)(2) is the conditional plea rule under which he would be entering the plea.

I would be ready to proceed with the, with the plea today.

THE COURT: Are you ready to proceed now?

MR. RUTBERG: Yes, Your Honor, I am.

THE COURT: Mr. Murrell, would you come forward, please?

THE DEFENDANT: (Complied.)

[The defendant was sworn at 11:06 a.m.].

THE COURT: Mr. Murrell, you are now under oath. You must tell the truth in this morning's hearing. If it is determined that you have not told the truth, you could be subject to another prosecution for perjury. The term "perjury" means lying under oath

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you would like to speak with your lawyer at any time throughout this morning's hearing, please let me know. Also, if there is anything that I say that you do not clearly understand, bring the matter to my attention immediately.

Do you understand, sir?

[20] **THE DEFENDANT:** Yes, Your Honor.

THE COURT: Please state your full name.

THE DEFENDANT: Anthony Murrell.

THE COURT: How old are you?

THE DEFENDANT: 31.

THE COURT: How far in school did you go?

THE DEFENDANT: I graduated high school, graduated recording arts specialty school, and that's as far as I went.

THE COURT: Where did you attend high school?

THE DEFENDANT: Lake Mary, Florida.

THE COURT: At this time, sir, I would like to ask you questions to make sure that you understand the nature of this morning's proceeding.

Have you ever been treated for any mental illness?

THE DEFENDANT: Not that I am aware of, Your Honor. I have had therapy in my past. More or less, I

would consider it preventative, more than something that has happened.

THE COURT: When did you receive therapy, sir?

THE DEFENDANT: Childhood years. Right after my family got divorced. I am not sure of the date.

THE COURT: And do you recall approximately what ages you were when you received treatment?

THE DEFENDANT: I believe seven, eight.

THE COURT: All right.

Do you recall what condition you were being treated [21] for?

THE DEFENDANT: Honestly, I don't, because it was so far in the past. My father might know. I believe he is the one who brought me into that.

THE COURT: Since the therapy that you had in your early years, have you had any trouble understanding what people have said to you?

THE DEFENDANT: (Indicating.)

THE COURT: Have your faculties been clear with respect to people conveying ideas to you, et cetera?

THE DEFENDANT: I believe I understand. Yes.

THE COURT: Counsel, have you had any reason to doubt the competence of the defendant?

MR. RUTBERG: No, Your Honor, I don't.

THE COURT: Government, do you have any reason to doubt the competence of the defendant?

MR. JOHNSON: I am not aware of any, Your Honor.

THE COURT: Since the therapy in the early years, have you had any other treatment related to mental health type issues?

THE DEFENDANT: I have had – I have gone to a hypnotist briefly and a family therapist very briefly as well.

THE COURT: For what condition were you being treated by the hypnotist?

THE DEFENDANT: The hypnotist, there was a lot of [22] depression and factors I didn't understand to be causing the depression.

I believed it was to be work, so much work, and the arguments our family were having at the time. Basically, trying to find out where that foundation did lie.

THE COURT: How about the family therapist? What were those issues related to?

THE DEFENDANT: In regards to along the lines of the same muddled, overworked family situation at the same time and my – I am trying to place this correctly – my lack of drive for my wife.

THE COURT: Do you have any questions about your ability to understand the nature of the allegations against you?

THE DEFENDANT: Could you repeat it one more time?

THE COURT: All right.

Do you have any questions, that is, do you believe in any way you have had problems understanding the charges pending against you?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you had any problems understanding the criminal justice system as it relates to your particular case?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you presently under the influence of [23] any drug, medication or alcoholic beverage of any kind?

THE DEFENDANT: The only medication are my allergy shots. They are given once every three weeks.

THE COURT: What types of allergies do you have?

THE DEFENDANT: Numerous. A test done on me with 60 pricks and I tested for 56 of them.

THE COURT: Have your allergies created any problems in your ability to understand what is happening?

THE DEFENDANT: No understanding.

THE COURT: Have you ever been treated for addiction to a narcotic or nonnarcotic substance?

THE DEFENDANT: No, Your Honor, drug free,

THE COURT: Have you received a copy of the Indictment which was filed in this case?

THE DEFENDANT: Yes, I have.

THE COURT: Have you had an opportunity to fully discuss the allegations in the Indictment and the case in general with your lawyer?

THE DEFENDANT: Yes.

THE COURT: Are you fully satisfied with the representation and advice given to you by your lawyer in this case?

THE DEFENDANT: Yes.

THE COURT: At this time I would like to advise you of the rights you have in this criminal case.

[24] Do you understand you have a right to plead not guilty and the right to have the Government prove your guilt beyond a reasonable doubt?

THE DEFENDANT: I understand that, Your Honor.

THE COURT: Do you understand you have a right to a trial by jury and at the trial the right to the assistance of a lawyer?

THE DEFENDANT: I understand that as well.

THE COURT: Do you understand that at a trial you would have the right to see and hear all the witnesses testify and have the Government's witnesses cross-examined in your defense?

THE DEFENDANT: I do.

THE COURT: Do you understand you would have the right on your own behalf to decline to testify at trial unless you voluntarily elected to do so?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand you would have the right to have subpoenas or other process issued for the production of any witnesses or exhibits that you wanted to present at a trial?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you further understand, sir, that by entering a plea of guilty, if that plea is accepted by the Court you will waive, that is, give up your right to a trial [25] and all of the rights associated with a trial as I have previously explained?

THE DEFENDANT: Yes, I do.

THE COURT: The offense to which you propose to plead guilty is a felony offense. If you are adjudged guilty, you could lose certain valuable civil rights in the United States including the right to vote, to serve on a jury, to hold public office and possess a firearm of any kind.

Do you understand?

THE DEFENDANT: Yes, sir, I do.

THE COURT: It appears as though, sir, the maximum penalty authorized for the commission of the offense alleged in the Indictment is not more than 15 years imprisonment, a $250,000 fine, a $100 special assessment and a period of supervised release following any term of imprisonment.

Do you understand the consequences of a plea of guilty in this case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You should understand, sir, sentencing in this cause will be conducted in conformity with the Federal Sentencing Guidelines and policy statements.

We are unable to tell you today exactly what your Guidelines will be. After today's hearing, you will meet with the United States Probation Office. They will also meet with representatives from the Government and, perhaps, other people, [26] including discussions with your family members.

After compiling the information, they will prepare a presentence investigation report. You and your lawyer will receive a copy of this report before the time of sentencing.

If you object to the findings of fact or the Guidelines computed, you may file objections to the report. At the time of sentencing the Court will entertain all of the objections and then decide the applicable Guidelines. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Notwithstanding the fact that we cannot tell you exactly what your Guidelines are, have you had discussions with your lawyer as to how the Guidelines might apply to your case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In some circumstances the Court may depart from the Guidelines, that is, impose a sentence

which is more or less severe than required by them. Departure issues are determined at the time of sentencing.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Parole has been abolished. If you are sentenced to a term of imprisonment, you cannot be released on parole. You may be released on supervised release.

Do you understand?

[27] **THE DEFENDANT:** Yes, Your Honor.

THE COURT: There are many factors used to determine the Guidelines, including the manner in which the offense was committed and whether or not you have prior convictions.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about anything we have discussed thus far, Mr. Murrell?

THE DEFENDANT: Not at this time, Your Honor.

THE COURT: The Indictment alleges that from on or about September 16th, 2002 through on or about September 24th, 2002, in Indian River County and elsewhere, here in the Southern District of Florida, that you, Mr. Murrell, using a facility and means of interstate commerce, that is, America Online, which is an Internet service provider, knowingly persuaded, induced, enticed or coerced an individual who had not attained the age of 18

to engage in sexual activity under circumstances that would constitute a criminal offense.

In this particular case the Government alleges that you attempted to commit the offense I just described.

The Government would have to prove certain elements beyond a reasonable doubt before you could be found guilty of the charged offense.

They would have to prove that during the period alleged you used a facility of interstate commerce, that is, [28] America Online. That you knowingly, that is, voluntarily and intentionally and not because of mistake or accident, attempted to persuade an individual who had not attained the age of 18 years to engage in sexual activity, and that this conduct would constitute a criminal offense.

The Government would have to prove these elements beyond a reasonable doubt.

Do you understand the elements of the charged offense?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: At this time, Mr. Murrell, we will ask the Assistant U.S. Attorney to provide us with a factual basis for the allegations in the Indictment.

Listen carefully to the Assistant U.S. Attorney. When he completes his statement, I will ask you if you agree or disagree with it in any way.

Counsel.

MR. JOHNSON: Your Honor, I was going to rely on the stipulated facts and the various exhibits that

were submitted to the Court as to what the Government would prove at trial.

THE COURT: I would ask you just to summarize those issues covering the elements so that we make sure Mr. Murrell understands the allegations, the elements and the facts that you would seek to prove at trial.

MR. JOHNSON: The Government would establish that the defendant and a law enforcement officer, posing as the father [29] of a 13-year-old child, engaged, first, in conversations on a facility and means of interstate commerce, that is, America Online, an Internet service provider, and that subsequently there was an agreement between the detective, posing as the father, that the defendant would be permitted to have sex with the fictional 13-year-old defendant, that he would be required to pay $300 and that he would need to use condoms in doing that, and that subsequently, pursuant to various phone conversations, the defendant was asked to meet at a hotel in Vero Beach, in Indian River County, in the Southern District of Florida, and, in fact, the defendant did appear and had with him $300 in cash, condoms and a teddy bear which he expressed that he intended to give to the potential 13-year-old sex partner.

That would be the Government's evidence.

THE COURT: Thank you.

Mr. Murrell, did you understand the statement of the Assistant U.S. Attorney?

THE DEFENDANT: Yes, I do.

THE COURT: Do you agree his statement accurately describes what you did in this case?

THE DEFENDANT: Yes, I do.

THE COURT: Do you agree that you used a facility of interstate commerce, that is, America Online, and that you attempted to persuade a person who was not yet the age of 18 to [30] engage in sexual activity, and that such conduct would be a violation of criminal law?

THE DEFENDANT: Yes, Your Honor.

THE COURT: As you heard earlier, Mr. Murrell, you have agreed to enter a plea of guilty to the allegations in the Indictment. In return, the Government has agreed to recommend that you receive a reduction for acceptance of responsibility. Depending on your total Guideline range and the level of Guideline as determined, you could receive a two or three-level reduction for acceptance of responsibility.

In order to receive this reduction, you must cooperate with the Probation Office by providing accurate and complete information about your conduct.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In addition, sir, the Government has agreed that you will be able to preserve your appellate rights with respect to the motion to dismiss that I denied earlier.

Do you understand?

THE DEFENDANT: I do, Your Honor.

THE COURT: Do you have any questions about anything we have discussed thus far, Mr. Murrell?

THE DEFENDANT: I do not, Your Honor.

THE COURT: With respect to agreements, are the parties aware of any other agreements or understandings?

[31] **MR. JOHNSON:** The Government is not aware of any other agreements or understandings.

THE COURT: Counsel?

MR. RUTBERG: Your Honor, there are no other agreements.

I do read the rule as requiring me to preserve in writing the right to have an Appellate Court review the adverse determination, and I would assume that I may do that between now and the time of sentencing to preserve it.

If not, I am prepared to hand-write a reservation of right to appeal signed by the defendant and myself so as not to run afoul of failing to comply with that rule.

THE COURT: Government, would you agree, as you have stated earlier, that the defendant may reserve his right in writing and orally and that satisfies the terms of the agreement if done prior to the time of sentencing?

MR. JOHNSON: Yes, the Government would agree.

THE COURT: Sir, I would request that you file the written version of the right to appeal the issues reached on the motion to dismiss. Of course, you have so stated orally and those issues have been argued orally and the Court's decision was stated for the record as well.

Mr. Murrell, are you aware of any other agreements between you and the Government?

THE DEFENDANT: No, Your Honor, I am not.

[32] **THE COURT:** Has anyone attempted to force you to plead guilty in this case, sir?

THE DEFENDANT: No, sir, Your Honor.

THE COURT: How do you plead to the Count in the Indictment, Mr. Murrell, guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: It is the finding of the Court in the case of the *United States of America versus Anthony F. Murrell* that the defendant is fully competent and capable of entering an informed plea and his plea of guilty is a knowing and voluntary plea, supported by an independent basis in fact containing each of the essential elements of the offense alleged.

Your plea is accepted, sir. You are adjudged guilty as to the Count in the Indictment.

Sentencing in this cause is scheduled for Wednesday, April 30th, 2003 at 4:15 p.m.

The parties are being given an Order on Sentencing. Please comply with the terms therein.

Are there any additional matters by the parties?

MR. RUTBERG: Nothing further, Your Honor. Nothing further for the defense.

We will file the written preservation as the Government has agreed and the Court, I assume, has agreed we may appeal the adverse finding.

Judge, thank you very much.

[33] **THE COURT:** Anything further by the Government?

MR. JOHNSON: Nothing further from the Government.

THE COURT: We are in recess in this cause. Have a good afternoon.

MR. RUTBERG: Judge, might I introduce to the Court my daughter and her friend seated in the courtroom? These are my child and her buddy who I am taking back to school this afternoon.

(Discussion off the record).

[34] **CERTIFICATE**

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

6/9/03
DATE FILED

/s/ Barbara Medina
BARBARA MEDINA, RPR-CP
Official Federal Court Reporter
Federal Justice Building, Ste. 1067
99 Northeast 4th Street
Miami, FL 33132 – 305/523-5138

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12582-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY F. MURRELL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion ___, 11th Cir., 19___, ___ F.2d ___).

(Filed Jun 29, 2004)

Before: WILSON and KRAVITCH, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

A&P S. REP. 104-230
S. Rep. No. 230, 104th Cong., 2nd Sess. 1996

REPORTS

TELECOMMUNICATIONS ACT OF 1996

SENATE REPORT NO. 104-230
February 1, 1996

Mr. Pressler, from the committee of conference, submitted the following
CONFERENCE REPORT
[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) Short Title. – This Act may be cited as the "Telecommunications Act of 1996".

(b) References. – Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

* * *

SECTION 507 – PROTECTION OF **MINORS** AND CLARIFICATION OF CURRENT LAWS REGARDING COMMUNICATION OF OBSCENE MATERIALS THROUGH THE USE OF COMPUTERS.

SECTION 508 – COERCION AND ENTICEMENT OF MINORS

Senate bill

Several provisions of the Senate bill protect children from harassing, indecent or obscene communications.

House amendment

Several provisions of the House amendment protect children from obscene or indecent communications.

Conference agreement

Section 508 would amend section 2422 of title 18 to prohibit the use of a facility of interstate commerce which includes telecommunications devices and other forms of communication for the purpose of luring, enticing, or coercing a minor into prostitution or a sexual crime for which a person could be held criminally liable, or attempt to do so. On July 24, 1995, the Senate Judiciary Committee held a hearing on online indecency, obscenity, and child endangerment. The record of this hearing supports

the need for Congress to take effective action to protect children and families from online harm.

1995 WL 435909 (F.D.C.H.)

Testimony
July 24, 1995

Senate
Judiciary

Child Pornography on the Internet

STATEMENT OF SENATOR LEAHY AT HEARING ON CYBERPORN AND CHILDREN: THE SCOPE OF THE PROBLEM, THE STATE OF THE TECHNOLOGY AND THE NEED FOR CONGRESSIONAL ACTION

July 24, 1995

This is the very first congressional hearing held on the issue of regulating indecent and obscene material on the Internet and the problem of children's access to objectionable online material. That is correct, the first.

In spite of the action taken by the Senate Commerce Committee when it added the Communications Decency Act to its telecommunications bills last year and this, they held no investigative or legislative hearings into this important and complex matter.

Indeed, when the Senate passed a restrictive version of the Exon-Coats Communications Decency Act on June 14, over my objection and those of Senator Feingold, it did so without the benefit of hearings or anything approaching a thorough examination of the matter.

I am old-fashioned enough to remember when we used to hold hearings first and pass legislation after – we got the facts, had analyzed the problem and had worked with the Administration and the public to craft a legislative solution to the public's legitimate concerns.

With all the magazine articles, talk show babble, and furor that has surrounded this issue, I am glad the Judiciary Committee is holding this hearing in order to begin to set the record straight. I want to commend Chairman Hatch and Senator Grassley for convening this hearing and look forward to the testimony of our witnesses this afternoon.

These are issues that greatly concern me: the future of the Internet; the best ways for parents to Control their children's access to the Internet and to protect against inappropriate and offense [sic] materials; the appropriate role of law enforcement.

I had asked the Attorney General of the United States as well as a coalition of private and public interest groups known as the Interactive Working Group to look at these issues and provide recommendations on addressing the problem of children's access to objectionable online material in a constitutional and effective manner.

I look forward to receiving the report of the Department of Justice as promptly as their study can be concluded.

Today, the Interactive Working Group is releasing its report describing some of the technology available today to help parents supervise their children's activities on the Internet and protect them from objectionable online material. Some of this technology was demonstrated last week in a meeting hosted by Representative Cox, who will testify here today.

We are finding that software entrepreneurs and the vibrant forces of the free market are providing tools that

can empower parents' to restrict their children's access to offensive material.

We can address the problem of online pornography by empowering parents, and not the government, to screen children's computer activities.

This is the best way to police the Internet without unduly restricting free speech of squelching the growth of this fantastic new communications medium.

It is parents, not the government, who should decide what restrictions to place on their children's access to that which they consider objectionable: whether it is beer advertising, or fantastic card games that some parents believe promotes interest in the occult.

Available blocking technology can make pornographic Usenet news groups of World Wide Web sites off limits to children.

Other commercially available products limit children's access to chat rooms, where they might be solicited, and limit children's ability to receive pornographic pictures through electronic mail. Yet other products allow parents to monitor their children's usage of the Internet.

Interested organizations, like the Christian Coalition or Mothers against Drunk Driving, could provide parents that use blocking technology with lists of sites these groups consider inappropriate for children.

On the other hand, government regulation will stifle this new industry. The Internet has been growing at an exponential rate and new uses for it are devised daily. Overly restrictive bans against indecency on the Internet

will prove not only unconstitutional but will also hamper the growth of this new communications medium.

The Internet does not function like a broadcast or a newspaper where a station manager or editor chooses which images or stories to send out in public. The Internet is like a combination of a great library and town square, where people can make available vast amounts of information or take part in free and open discussions on any topic.

It has provided great opportunities for our disabled citizens and has enabled our children the ability to discuss issues with some of society's greatest minds. With this technology, I conduct electronic town meetings with Vermonters, post information about legislative activates, and hear back from Vermonters about what they think.

To impose the government regulation of broadcasters to the Internet is inappropriate. Anyone with a computer and a modern [sic] can send something out on the Internet, but unlike a broadcaster, potential listeners must seek out this information and download it.

Any legislative approach must take into consideration online users' privacy and free speech interests. If we grant too much power to online providers to screen for indecent material, public discourse and online content in cyberspace will be controlled by the providers and not the users of this fantastic resource.

On the other hand, we want our laws to encourage and not discourage online providers from creating a safe environment for children.

Even worse would be discouraging online providers from allowing children onto their services altogether.

If online providers are liable for any exposure of indecent material to children, people under the age of eighteen will be shut out of this technology or relegated by the government to sanitized "kids only" services that contain only a tiny fraction of the entire Internet. That would be the equivalent of limiting today's students to the childhood section of the library or locking them out completely.

This is not how this country should face the increasingly competitive global marketplace of the 21st century.

What are we doing if we discourage the Project Gutenberg from placing online the works of Charles Dickens, Geoffrey Chaucer or D.H. Lawrence for fear of prosecution because someone, somewhere on the Internet, might find the works indecent? Would the Internet still be the great electronic library and setting for open discussion it now promises?

Parents know their children better than any government official, and are in the best position to know the sort of online material to which their children may be exposed.

Finally, we must recognize our existing laws and what they provide by way of protection. Our criminal laws already prohibit the sale or distribution over computer networks of obscene material. We already impose criminal liability for transmitting any threatening message over computer networks.

We already proscribe the solicitation of minors over computers for any sexual activity, and the illegal luring of minors into sexual activity through computer conversations. Indeed, only a few months ago under Senator Grassley's leadership we increased the penalties for many

of these offenses in "The Sexual Crimes Against Children Prevention Act of 1995."

We need to work with law enforcement to make sure they have the resources and training to track down computer criminals.

I look forward to working with all members of the Committee as we move forward on these important matters.

1995 WL 435910 (F.D.C.H.)

Testimony
July 24, 1995

Senate
Judiciary

Child Pornography on the Internet

News From:

Statement of U.S. Senator Russ Feingold

Judiciary Committee Hearing on Cyberporn and Children: The Scope of the Problem, the State of the Technology and the Need for Congressional Action

July 24, 1995

The issue we are discussing today is of great concern to me, not simply because I am a member of this Committee, but because I am a parent who is concerned about the welfare of my children as they use the Internet. I am also a parent who is enthusiastic about the positive changes and opportunities new forms of communications technology can offer to my children.

Interactive computer networks have clearly changed the way Americans, and indeed people throughout the world, communicate with one another. While individuals carry on conversations in cyberspace much like they do over traditional telephones, the use of the Internet goes far beyond that characteristic.

– On the Internet, one can act as a publisher and a writer simultaneously by posting their works on various bulletin boards, newsgroups, and on a World Wide Web page.

– One can search out just about any information they wish without leaving their home. Students can access books and other research materials simply by sitting at a personal computer properly outfitted for Internet access. There is a wide range of literature available through the Internet, and with efforts such as Project Guttenberg, which we'll learn more about today, there will soon be many more books available on-line.

– Individuals can participate in political, academic and scientific forums without being an expert in a particular field.

– Entrepreneurs can market and sell their products simply by establishing their own home page on the World Wide Web.

– And now, people throughout the United States will be able to participate in Senate Committee hearings through the Internet. Committees will not be limited to hearing the comments and opinions of those who are part of more organized coalitions and who can afford to make the trip to Washington D.C. The U.S. Senate, more than ever before, has the opportunity to have true grass roots participation in the political process through the Internet. That is an incredibly positive development for this country and emphasizes the potential of decentralized interactive communications networks.

In short, this new world of communications is virtually open to anyone with access to a computer with a modem and an Internet connection and who is also willing to take a little time to learn how to retrieve all the type of information out there.

In fact, there are a number of discussion groups on the Internet debating the very issue we are addressing today in this hearing. Those on-line debates are very heated, but they provide a positive outlet for the exchange of ideas.

While it is doubtful that, at least in the near term, interactive computer networks will completely replace more traditional forms of communications, it is clear that they have found at a minimum a lasting place within our society. The potential of this technology is virtually without bound [sic].

However, with these new opportunities come new challenges – the most important of those protecting our children as they use the Internet to communicate with others. As tragic as it may be, there are those in this country who will try to harm our children, either for profit [sic] for even more perverse reasons. Unfortunately those individuals, who prey off the vulnerability and innocence of children will use whatever means they can to commit their crimes, including communications technologies.

In trying to protect our children, we must recognize the Internet for what it is, simply a new way of communicating. My concern in recent months, as I have participated in this debate, is that the discussion has become so sensationalized that we may fail to react appropriately in areas where on-line dangers actually exist. I don't want to see this Congress respond to existing problems by creating new legal and constitutional dilemmas.

That is what I believe happened when we passed telecommunications legislation last month. Members of the Senate reacted as any parent would when they were confronted with the "blue binder" filled with pornography downloaded from the Internet. What members weren't told

was where the graphics and text came from – whether from public on-line chat groups or for-pay adult bulletin boards – and how difficult they were to access. Senators reacted as most of us would in that situation, they voted for an amendment they thought penalized pornographers and sexual predators and which purported to protect children.

In my opinion, that legislation duplicated existing prohibitions for on-line obscenity and created new restrictions on speech which is protected by the First Amendment.

In a well-intentioned attempt to protect children, we trampled on one of the most fundamental rights we have in this country – to speak freely and without reservation independent of prevailing views of what is offensive and unconstrained by a frequently changing political environment.

I am concerned that the Senate will take further legislative steps that will stifle the growth of interactive communications technology and ultimately censor communications on the Internet while not truly solving the problem.

I think we need to look very carefully at the following questions:

Where do the fundamental problems exist with abuse of the Internet – on newsgroups, on for-pay bulletin boards, within electronic mail, or elsewhere?

What is the nature of the problem – sexual predation, obscenity, pornography, indecency, profanity, or harassment?

What laws – federal, state and local – exist currently to address those problems?

And finally, where do those laws fall short of protecting our children?

It is incumbent upon Congress to restore some rationality to the debate by trying to answer these questions. In addition, those participating in this debate need to stop using terms with very different meanings interchangeably, such as obscenity, pornography and indecency. We must learn how interactive communications systems differ structurally from existing types of communications technologies as well as how they are similar. Supreme Court decisions on content regulation and the First Amendment have always weighed heavily on the nature of the medium in question.

Hopefully, we will have some of these questioned [sic] answered in today's hearing. However, I want to caution my colleagues that one hearing alone cannot adequately address the complexities of this issue nor will it lead us to the proper solution without further study.

I strongly urge my colleagues to exercise caution and restraint when considering legislative attempts to regulate free speech. We must look for solutions that empower parents to exercise more control over the types of information their children receive over computer networks. Free-market remedies, where they are possible, are almost always preferable to heavy handed content regulation and criminal penalties imposed by the federal government.

I look forward to learning more about all of these issues from our witnesses, and I thank them from [sic] participating in this hearing.

1995 WL 435911 (F.D.C.H.)

Testimony
July 24, 1995

Senate
Judiciary

Child Pornography on the Internet

News Release

JUDICIARY COMMITTEE

July 24, 1995

STATEMENT OF SENATOR ORRIN G. HATCH
SENATE JUDICIARY COMMITTEE HEARING ON CYBERPORN AND CHILDREN THE SCOPE OF THE PROBLEM, THE STATE OF TECHNOLOGY, AND THE NEED FOR CONGRESSIONAL ACTION

I commend Senator Grassley for his efforts. One of the greatest challenges facing Congress today is to ensure that our laws keep pace with the rush of technology that is changing virtually every aspect of the lives of all Americans. In the area of personal communications, the Information Superhighway is a reality, reaching into homes, schools, libraries and businesses in every community in America. And no segment of our society is (both literally and figuratively) more "plugged into" this communications revolution than our young people.

While the computer telecommunications network, the Internet, can be a powerful tool for good, bringing information and entertainment to millions, like other forms of communication there exists the potential for misuse. The easy access to an ever-expanding amount and variety of communications afforded by the Internet carries with it the danger that, absent appropriate safeguards, our

children will continue to be able easily to access obscene and indecent materials, which are already far too present and available on the Internet to anyone, including minors.

The reality is that many young people can and do use the Internet with little direct parental supervision. That is why I have joined as a cosponsor of S. 892, the Protection of Children From Computer Pornography Act of 1995, which is the subject of today's hearing.

While the telecommunication networks, access providers, and electronic bulletin boards, which would be regulated with respect to the knowing or willful transmission of indecent material to children under S. 892, represent comparatively new and highly complex technologies, the social issue addressed by this bill is neither new nor complex. We, as a society, have both the legal right and the moral obligation to protect our children from exposure to the filth of graphic Pornography.

This fundamental principle should apply to all forms of communication. A graphic depiction of sexual activity which is patently offensive according to contemporary community standards is indecent material. That same depiction of sexual activity is no less indecent by virtue of being electronically transmitted into a home or school or library by means of an expensive, state-of-the-art computer system than if it is contained in a pornography magazine purchased at a local newsstand for a few dollars and carried into the same home or school or library in a plain brown wrapper. Few in our society would argue with the proposition that a bookstore or newsstand operator who knowingly gave or sold a pornography magazine containing that material, which he knew to be indecent, to someone he knew to be a child, can and should be

prosecuted under the law. S. 892 simply extends that rule of law to the operators of, in effect, electronic bookstores and newsstands.

This bill does not violate any First Amendment protections. Our courts have long held that the government has a legitimate and compelling interest in limiting the access of children to indecent material. S. 892 's carefully worded to limit its application to knowing, reckless or willful transmission of indecent material to children, while still permitting adults access to otherwise constitutionally protected material.

The bill is thus sufficiently precise and narrowly tailored to withstand judicial scrutiny, including on First Amendment grounds. It also provides adequate safeguards against prosecution for Internet access providers and electronic bulletin board operators who may inadvertently transmit indecent materials to children, without knowledge either of the indecent nature of that material, or that the recipient is a minor.

S. 892 addresses a significant and growing threat to the well-being of our children and the American family. I strongly support this legislation and urge its prompt passage by this Committee and by the full Senate.

1995 WL 435918 (F.D.C.H.)

Testimony
July 24, 1995

Senate
Judiciary

Child Pornography on the Internet

Committee on Judiciary
United States Senate

Written testimony of
Dee Jepsen
President, "Enough is Enough!"
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July 24, 1995

SUMMARY STATEMENT

This statement is in support of S.892, The Protection of Children from Computer Pornography Act of 1995. In my capacity as President of "Enough is Enough!" – a non-profit, non-partisan women's organization opposing child pornography and illegal obscenity, I am very familiar with the issue of contemporary pornography – its content, availability and its harms.

Pornography demeans and degrades women, victimizes children and ruins men. It contributes to domestic and spouse abuse, rape, incest and child molestation. And a great share of it is not protected speech, any more than libel, slander or false advertising are protected speech. Many Americans do not realize this fact.

Due to the recent media focus upon "cyberporn," and consequent growing public awareness of computer

pornography and its availability, especially to children, pornography has been thrust into prominence on America's reassessment agenda.

We must provide a protected space in which our children and grandchildren can grow up. A time of innocence has been stolen away from today's children. It is time that adults of this nation take responsibility to combat the predators who are polluting the minds of our nation's most valuable resource – our children. The Protection of Children from Computer Pornography Act of 1995 is a step in that direction, and is needed.

Recently, PRIME TIME did a television program on children and sex, starkly revealing that children 10 and younger are being "sexualized" due to constant exposure to sexually-oriented materials. Moms and dads, grandmothers and grandfathers – all responsible citizens, will not accept a feeble defense of doing nothing to protect the well-being and safety of children.

Clinical studies and life experiences attest to the fact that pornography numbs the moral conscience, stunts moral growth and encourages anti-social behavior. Once pornography has been viewed by young, vulnerable children, it can start a chain of abuse that carries over into their adult and family lives. You cannot simply push the delete button and eliminate those pornographic images from their memories; they will continue to play over and over again in the theater of their minds . . . perhaps for life.

With the advent of personal computers (PCs), a whole new world of pornography access rushed in through its floodgate. Today, we face an insidious threat – hard-core, child pornography and "indecent" material, which is

harmful to minors, are being transmitted over the Internet directly into our homes. Children are usually more adept than adults at operating computers, and today, with little effort, a child with a computer and a modem can download the most vile and perverse, often violent, hard-core pornography ever produced.

Not only is any child with a computer and a modem at risk of exposure to pornography on the Internet, but they are at risk of being exposed to pedophiles there as well. Pedophiles are those adults who have a sexual appetite for young children. They now electronically lurk on the Information Super Highway, as in schoolyards, to stalk their prey, unsuspecting children. As the public debate about computer pornography has intensified in recent weeks, there has often been misinformation, or partial information appearing in print.

To find effective solutions to the computer pornography problem, it will take the combination of education, legislative action, public policy initiatives and aggressive law enforcement, as well as the exercise of corporate and individual responsibility. The answer is everyone working together – parents, individual citizens, schools, legislators, law enforcement and the corporate electronic business community.

I am urging the passage of the Grassley Bill S.892, The Protection of Children from Computer Pornography Act of 1995 because it will help to protect children from exposure to pornography and suffering its life-changing impact. This Act does not place an unfair burden upon the access providers, but it does place responsibility upon them to do what they can do to protect the nation's computer-using children. I am hopeful that members of both

parties will check their other differences at the door and join ranks on this issue . . . for the sake of the children.

Mr. Chairman, I speak today in support of S.892, The Protection of Children from Computer Pornography Act of 1995. In my capacity as President of "Enough is Enough!" – a non-profit, non-partisan women's organization opposing child pornography and illegal obscenity, I am *very* familiar with the issue of contemporary pornography – its content, availability and its harms. I speak not only on behalf of "Enough is Enough!" but, on a personal level, as a woman and as a grandmother of nine.

Although we have many caring men involved in our work, our organization focuses primarily upon educating and mobilizing women, because women speak with a special authority on the issue of pornography – for we, and our children are its primary subjects . . . and its primary victims. Pornography demeans and degrades women, victimizes children and ruins men. It contributes to domestic and spouse abuse, rape, incest and child molestation. And a great share of it is not protected speech, any more than libel, slander or false advertising are protected speech; therefore, it is not a 1st Amendment issue. It is not legal material. Many Americans do not realize this fact.

Today, America finds itself at a point of serious reassessment.

Americans are coming rapidly to the awareness that the moral fabric of our country has become badly frayed. The consequences have become apparent. Due to the recent media focus upon "cyberporn," and consequent growing public awareness of computer pornography and its availability, especially to children, pornography has been thrust into prominence on America's reassessment

agenda. The problem of pornography is an issue whose time has come.

From all sides more and more voices are proclaiming that our -culture is in crisis – a crisis of character. A second White House Conference on Character was convened. Organizations to promote character have been formed. For over a year, Bill Bennett's book, The Book of Virtues, has been near the top of the New York Times best-seller list. Traditional family values are being touted in nationwide political campaigns, by both parties. The entertainment industry is being challenged "to clean up its act."

And while Congress and the Administration are wrestling with how to balance the budget and reduce the deficit so our children and grandchildren will not inherit our debts, there is another issue they must address as well . . . how to provide a protected space in which our children and grandchildren can grow up. As our common culture has become coarser, children have been robbed of their childhood. A time of innocence has been stolen away from today's children. It is time that adults of this nation take responsibility to combat the predators who are polluting the minds of our nation's most valuable resource – our children. The Protection of Children from Computer Pornography Act of 1995 is a step in that direction, and is needed.

Recently, PRIME TIME did a television program on children and sex, starkly revealing that children 10 and younger are being "sexualized" due to constant exposure to sexually-oriented materials. In an interview with Oprah, discussing sensational TV talk shows, First Lady Hillary Clinton asserted, "I'm tired of folks saying we can't change

it because that's censorship." I, and many other Americans, would agree that tired excuse, which is now also being used in reference to any legislation or regulation of computer pornography, will no longer work in this country. Moms and dads, grandmothers and grandfathers – all responsible citizens, will not accept this feeble defense of doing nothing to protect the well-being and safety of children.

Clinical studies and life experiences attest to the fact that pornography numbs the moral conscience, stunts moral growth and encourages anti-social behavior. In our organization's work with victims, we continually look into the eyes and hear from the hearts of those that have been bruised and broken by the effects of pornography. When we allow pornography to be freely available to children, pornography is not only an attack upon the present, but an attack upon the future as well. Once pornography has been viewed by young, vulnerable children, it can start a chain of abuse that carries over into their adult and family lives. You cannot simply push the delete button and eliminate those pornographic images from their memories; they will continue to play over and over again in the theater of their minds . . . perhaps for life.

Over the years the pornography industry has had two basic business goals. To remove as much of the social stigma as possible from consuming pornography; secondly, to use every advance in technology to lessen the difficulty of purchasing and consuming pornography.

Until the late 1970's, pornography was primarily available in magazines and 8mm film loops. It was distributed through the mail, street stalls and pornographic

bookstores in the "bad part of town." The distasteful locations limited the market.

In the 1980's the advent of the VCR was exploited by pornographers. Consumers could purchase videos and watch pornography right in their own homes. In addition, the ability to charge customers for special phone numbers led to the development of dial-a-porn. Satellite technology and the growth of cable led to further inroads by pornographers world-wide.

Then came the advent of personal computers (PCs), and a whole new world of pornography access rushed in through its floodgate. Computer related developments will shape how the pornography industry seeks to market its products over the next quarter-century. And who will suffer the most? . . . the children!

Today, we face an insidious threat – hard-core, child pornography and "indecent" material, which is harmful to minors, are being transmitted over the Internet directly into our homes. The Information Super Highway has been invaded by morally-irresponsible, reckless drivers, who travel the Highway with total disregard for the damage inflicted on young minds through the pornography they provide.

Children are usually more adept than adults at operating computers, and today, with little effort, a child with a computer and a modem can download the most vile and perverse often violent hard-core pornography ever produced. This material includes such themes as incest, rape, bestiality (actual sex with most of the animals in Noah's Ark), torture and mutilation. This material can be accessed in full and clear color with just a few computer key clicks. This is pornography that the Supreme Court

has ruled not to be protected speech, and is illegal for adults as well as children. There is federal legislation outlawing it. We need S.892, however, to provide federal legislation outlawing "indecent" material. This material is not protected speech and is already legislated against in most states and many local communities under the rubric of "material harmful to minors." With the advent of computers which send indecent material across state lines this federal legislation is needed.

Pornography is harmful and destructive in the following ways:

> * it plays a major role it he [sic] molestation of children, serving as an instruction manual for these crimes;
>
> * it exposes children at an impressionable age to attitudes and behaviors that warp and twist their view of human dignity and sexuality;
>
> * it shapes negative, degrading attitudes about women, erotizing inequality;
>
> * it encourages rape and the rape myth that women say "no" but mean "yes" and they like violence;
>
> * it erotizes violence and then fuels sexual violence;
>
> * it holds and [sic] addictive and fatal attraction for many men and teenage boys, it invades their thoughts and manipulates their behavior;
>
> * it encourages the transmission of STD's (sexually transmitted diseases) and
>
> * it lowers community standards, which has a denigrating affect upon our entire culture.

Some say that pornography is a victimless crime; this is a myth perpetrated by those profiting through this multi-billion dollar industry and pornography consumers. What we see, and what we hear and read affect how we think and how we act. That is why companies spend millions of dollars on advertising each year . . . it works. And, of course, this premise is the very basis of all education.

Not only is any child with a computer and a modem at risk of exposure to pornography on the Internet, but they are at risk of being exposed to pedophiles there as well. Pedophiles are those adults who have a sexual appetite for young children. They now electronically lurk on the Information Super Highway, as in schoolyards, to stalk their prey, unsuspecting children. Let me give you a real life example.

A friend of one of the "Enough is Enough!" staff members tells how her husband intercepted a suspicious letter from a distant state addressed to their 16-year-old daughter. The letter proved to be from an adult man to whom the young girl had given her real name and address over her computer.

This electronic predator began his letter by asking the girl to describe her fantasies, and then described his. He went into graphic, vulgar sexual detail. At first the teenager laughed about it, but quickly realized that it was no laughing matter, for her obscene "pen pale [sic]" could show up on her doorstep one day to fulfill his fantasy. She had made the dangerous mistake of giving out her real name and address to an unknown person through her home computer.

As the public debate about computer pornography has intensified in recent weeks, there has often been misinformation, or partial information appearing in print. The detractors of efforts to address the issue legislatively have taken to various forms of attack in defense of electronic pornography. Their desperation is apparent as the truth about this situation has been brought to light. Seldom, even in these times of hyper-scrutiny and scathing criticism, does the level of viciousness reach the level it has on this issue. These detractors have tried to discredit and "beat-up" the messengers when they haven't liked the message. They have contested the exact percentages of various types of computer pornography available and how many people consume it. For those of us who are battling this vile and degrading material, that is exactly where we would like to stage the debate. Does it really matter what the exact percentage is of material that is available by computer, to children as well as adults – material that degrades and tortures women, sexually uses children and debases human beings (and, in the view of animal lovers, even animals). Any is too much. One child's life misdirected into unhealthy sexual behavior is too much.

If we do nothing to stem this flood of pornography available to children by computer, we will be changing the base line on the availability of illegal material. It will be comparable to inviting children to have free access into adult x-rated bookstores and theaters.

In reality, we will never be able to eliminate all illegal pornography and protect all children from exposure to pornography. It is, however, imperative that we do all we can and we should do it in a reasoned, reasonable, yet responsible manner. It will take everyone working together

to produce the best answer, or answers, to the problems of cyberporn.

Some are saying that this problem is totally the parents responsibility. Parents must become educated about the dangers present in unmonitored computer use by their children. Parents also need to learn more about computer technology in order to do so. But to place all the responsibility upon the parents not only is unfair, it is inadequate to protect children. Parents can't be present 100% of the time to monitor their children, and they certainly cannot monitor what happens when they are at the homes of friends, whose parents may not be as informed or vigilant. Bringing a computer into your home for your child's use under this proposed solution is like having them bring home a rabid dog for the kids to play with, sitting him in a corner and then having to watch them constantly so the dog won't bite them.

Some suggest technical screening "fixes". There are some developed now and more are being worked upon. These are goods [sic] ideas, but to say that this is the total answer is once again unfair and inadequate. Prior to this time those who wanted to consume pornography had to pay for it. Are we now going to say those who do not want pornography for their kids have pay not to get it? This would be a major shift of policy and approach. In addition, those who have in-depth computer understanding acknowledge that there is no way to screen all pornographic material.

It is often asked that if much of this material is illegal (not protected speech) isn't it up to law enforcement to simply enforce the law? There should be aggressive enforcement of the pornography laws in the area of computer

porn. The reality is, however, that law enforcement resources are limited and it is difficult to monitor and enforce this electronic outlet.

To find effective solutions to the pornography problem, it will take the combination of education, legislative action, public policy initiatives and aggressive law enforcement, as well as the exercise of corporate and individual responsibility. The answer is everyone working together – parents, individual citizens, schools, legislators, law enforcement and the corporate electronic business community. We must all take the responsibility to protect the welfare of our nation's children. Those in the technology community should be encouraged to work diligently to find every way possible to protect children from destructive pornographic material via computer. Yet we must all be committed to protecting both the free flow of material on the Information Superhighway and the children of the country. The Grassley bill does not place an unfair burden upon the access providers, but it does place responsibility upon them to do what they can do to protect the nation's computer using children.

Serial killer Ted Bundy said just hours before he was executed in 1989 for his heinous, sex crimes against women and children. . . . I take full responsibility for what I've done . . . My experience with pornography that deals on a violent level with sexuality you become addicted to it . . . the barriers to really doing something were being tested constantly, and assailed through the kind of fantasy life that was fueled by pornography . . . pornography, which was an indispensable link to the chain of behavior, the chain of events that led to the behavior, to the assaults, to the murders. I have met a lot of men who were

motivated to commit violence just like me. Without exception, every one of them was deeply involved in pornography.

I am urging the passage of the Grassley Bill S.892, The Protection of Children from Computer Pornography Act of 1995 because it will help to protect children from exposure to pornography and suffering its life-changing impact. I am hopeful that members of both parties will check their other differences at the door and join ranks on this issue . . . for the sake of the children.

1995 WL 496896 (F.D.C.H.)

Testimony
July 24, 1995

Senate
Judiciary

Child Pornography on the Internet

[Donelle Gruff]

I was logged on a bbs bulletin board serviceOE called "the zoo" and Bill logged on and came into the teleconference and told everyone he had a bbs that was free and instructed everyone to call it and gave us the number to call. I logged on to Bill's bbs "Beyond the Sound Barrier" and at this time I was required to give him my mane [sic] and address. After doing this I logged on with my usual handle "She Devil" and or the the [sic] first couple of days he seemed really nice. He welcomed me to his bbs and told me to look around at what the channel had to offer. The next day he asked me if I would be a co-syop and watch over the teleconference when more phone lines were installed. I said yes, and then after a couple of days he started asking me personal questions such as "do I shave besides my legs, "what bra size do I wear", would I go out with him", and "would I blow him". When I would not answer he kept asking me so I logged off and went to the other bbs "the Zoo".

He followed me to that channel and logged on and kept telling me he was going to come to my house. After telling him 20 times not to come over he finally agreed and I thought that was the end of it. That night at about 1:30 a.m., three days after I became a co-syop, he came over and I told him not to come back again. I said :"it's late and

he was going to have to leave" and he did as I asked. The next day he came to may [sic] house and sat outside for four hours and may [sic] mother was forced to call the police and then he left. The next day he came back and sat outside my house again and when I want to the front widow [sic] to see what the dog was barking at, he saw me and left. That Saturday I want [sic] to the bowling alley to meet a few friends and he followed me around all night but didn't say anything to me.

A couple of days late [sic] when I logged on to his bbs he emulated me and took me to some pornographic pictures [emulated is a term that refers to using a computer at a remote location at [sic] to act as though it were my computer; in so doing, the remote user can "appear" to others in the cyber world as though he is me. This is a procedure which, weigh [sic] certain software, can be done without my permission, and sometimes, without my knowledge]. When he did that he [sic] I had no way of getting out of them and I turned my computer off. The next time I logged on his bbs he attempted to down load pornographic pictures to me but he was having trouble doing it. He allowed me to downloan [sic] one to myself and I did so I could give one to the detective. I have not called his bbs since then.

1995 WL 435916 (F.D.C.H.)

Testimony
July 24, 1995

Senate
Judiciary

Child Pornography on the Internet

CHILD PORNOGRAPHY ON THE INTERNET

Testimony by

Patricia W. Shao
Parent

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Testimony by
Patricia W. Shao, Parent

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My name is Patricia Shao. I live in Bethesda, Maryland, and I am the mother of two children, who have grown up with the wonders of the computer, and the limitless opportunities it offers them.

I am here today to share an experience and to express my concerns as a parent, with children growing up on the "Information Superhighway".

Early this summer, my thirteen-year old daughter went to her friend's house in Potomac to play on the computer. They were in the neighborhood; they were properly supervised; and I knew they were safe. It was shocking to discover later what they had experienced that afternoon.

The girls were in a teenage chatroom on America OnLine, and were propositioned for "cybersex". Initially, they thought it was funny, giggling as you'd expect thirteen-year olds would, but as the requests became raunchier, they were frightened.

I, too, am frightened, and appalled at how I am not able to protect my children on the Internet. As I continue to research this topic, and speak with other children and parents, I have discovered that almost seven out of ten have been victimized on the Internet.

I speak openly with my children, so my daughter was not afraid to come to me with this experience. My daughter's friend, however, insisted that I could not reveal what happened to her parents. She felt almost guilty, as if she were responsible for what happened to her. When does a victim become the guilty party in this? Only when the victim is confused and happens to be a child. Children as young as ten years old have related stories to me of how they were propositioned, and of nude pictures sent to them on their computer so they could recognize the sender, who wanted to set up a face-to-face meeting.

I understand that I have responsibilities as a parent to protect my children. I am in the communications field myself, and am aware of the wonderful benefits of using the computer for research, communications, creativity, and entertainment. What is disconcerting to me as a parent is the fact that I was unaware of the dangers of chatting on-line, and of the amount of pornographic material available to anyone with a computer and a modem. I've learned that you can download hard-core pornography; that you can search the Internet to talk to anyone with the same interests as yours, be it common or perverse, and that all this is [sic] can be accessed by children free of charge.

I am aware of software and other "lock-out" features that I can download into my computer. But what happens when my children are at a neighbor's house? What happens if peer pressure builds, and a normal sleep-over party of teen-age boys becomes an opportunity to read and view pornographic material, material they may not have access to otherwise? What happens in multi-cultural homes that own computers? Parents that may not be literate, but with children who have been educated here and have access to this indecent and obscene material. Children today have grown up with the computer, and I can safety [sic] say they are more computer literate than the majority of their parents.

An education process has to start immediately to help protect our children. I am working with Enough is Enough, a wonderful group based in Fairfax, Virginia, dedicated to protecting children against pornography. I have concerned parents and businesses in my community involved in starting grassroots organizations to educate both the children and parents on this issue.

I believe in the freedom of speech. I also believe in responsibility; responsibility by the providers of the online service companies to protect the innocence of children. If hard-core pornographic materials are illegal in the mainstream distribution channels, it should also be illegal on the Internet. If society has laws to protect children against child molesters, then there should be laws against these child molesters looking for victims on the Internet, too. They may have looked on school playgrounds yesterday, but the playground for the Children of the Nineties is the Information Superhighway.